C 85/23

Reducing Highway Crashes Through Administrative License Revocation

NEWARK PUBLIC LIBRARY

MAY 23 1986

U. S. GOVT. PUBS.
DEPOSITORY 376

U.S. Department of Transportation
National Highway Traffic Safety Administration

TD 8.2:

READEX FICHE best copy available

Contents

Background

Excerpts from Final Report, Presidential Commission on Drunk Driving . 1
Summary of Public Meetings Conducted by National Commission Against Drunk Driving 5
Do's and Don'ts on Administrative License Suspensions, and Other Issues 7

State Experience With Administrative *Per Se*

Administrative *per se* in Oklahoma 11
Prehearing License Revocation of Drinking Drivers—The Minnesota Experience 15
Avoidable Pitfalls in Administrative Suspension Programs 21

Legal Issues

A Model Law on Administrative License Suspensions/Revocations, and a Comparison of State Laws 25
Court Challenges to Administrative Suspension/Revocation 47
Summary Suspension of Driver Licenses of Drunken Drivers—Constitutional Dimensions 51
Administrative Procedure Issues Involved in the Summary Suspension of Driver Licenses for Driving While Intoxicated 61

Where Do We Go From Here?

A Discussion of Administrative License Suspensions 69
Overcoming Problems and Costs of Administrative Hearings 73
Costs of an Administrative Driver License Revocation System 77

Appendix

National Transportation Safety Board Safety Study 83

Contents

The Presidential Commission on Drunk Driving*

Introduction

The Presidential Commission on Drunk Driving was charged with a most important and far-reaching task: to encourage State and local governments, as well as the private sector, to implement programs that will reduce the carnage caused by the drinking driver on our highways. This task is not an easy one. In fact, to reach this goal the Commission's recommendations must go far beyond the highway environment to the heart of the problem—society's values, attitudes, and behaviors regarding the use, and abuse, of alcohol.

Past Efforts

This nation has tried in the past to combat drunk driving. Millions of dollars have been spent by all segments of American society. These efforts have applied new and improved technology, procedures, and laws to reduce driving under the influence. Information programs and limited health and educational efforts have been a part of these undertakings, but few have been carried out on a comprehensive sustained basis.

In some cases, these past efforts have shown short-term success; in others, the impact was not noticeable. For example, between 1970 and 1976 the Department of Transportation and the National Highway Traffic Safety Administration conducted the Alcohol Safety Action Program, which had some measure of success, but the efforts were not uniformly sustained. Alcohol-impaired driving continues to be a serious public health and safety problem. It is the number one killer of young people in this nation.

The Drunk Driving Problem Today

At least 50 percent of all highway deaths involve the irresponsible use of alcohol. Over the past 10 years, 250,000 Americans have tragically lost their lives in alcohol-related crashes. Conservative estimates place the annual economic loss at $21 billion, while others run as high as $24 billion. There is, of course, no way to measure the loss of human lives.

In single vehicle fatal crashes, for which fault can be more easily ascertained than in multiple vehicle crashes, upwards of 65 percent of those drivers who died were legally under the influence, i.e., their alcohol level was above 0.10. Furthermore, more than half of the drunk drivers who were involved in fatal crashes had blood alcohol concentrations (BACs) twice that of the legal limit. The average BAC of these drunk drivers was 0.20. These figures suggest that the majority of alcohol-related fatal crashes is caused by heavy (problem) drinkers. This is not to say that less heavy, less chronic, "social" drinkers are not involved—they are—but it is the individual who regularly abuses alcohol who appears to be most often involved in alcohol-related fatal crashes.

This becomes even more significant in light of the fact that only one in five hundred (1/500) to one in two thousand (1/2,000) drivers on the road with a BAC greater than 0.10 are arrested for driving under the influence. The low likelihood of arrest, and a lenient judicial attitude fostered by a misperception of the seriousness of the offense, are important factors in perpetuating this nation's drunk driving problem.

An even more pervasive problem is the social acceptability of intoxication and drunk driving. In a society where mass transportation is underdeveloped and underutilized, the person who drinks at a party or a commercial establishment will most likely be a driver or passenger in an automobile. Americans are uncomfortable with those who overdrink, but by and large do not feel it is their responsibility—or even their right—to prevent intoxication among the members of their own social circles. In addition, Americans have a long tradition of laughing at "funny drunks" in the movies, on the stage, and in their own social circles—constituting a tacit, albeit uncomfortable, societal O.K. to drunkenness. The combination of the social acceptance of intoxication and the omnipresence of the individual passenger car adds up to the continued social acceptability of drunk driving.

*Excerpts From The Final Report Issued November, 1983

The New Hope of Solution

In the past two years, society has reacted to the drunk driving problem in ways it had not in the past. A number of citizen action groups have brought the problem of alcohol-related tragedies to the attention of the public and to officials at the local, State, and Federal levels. The Presidential Commission was the culmination of a crescendo of voices—voices of victims and their families—which demanded action. The demand for action is not new, but its intensity and extent have never been more dramatic. Such a national outcry presents an enormous opportunity and yet an enormous danger.

The enormous opportunity arises from the fact that the public is united in demanding solutions—no one is in favor of drunk driving, not even drunk drivers. For example, within the last year, 39 States have enacted improved legislation, and 41 States have established task forces or Commissions to examine the problem, to identify system deficiencies, and to recommend solutions. The media have become actively involved in supporting and publicizing improvements in the system. Legislators, enforcement officials, prosecutors, and judges around the country have responded to society's demands by enacting more effective legislation, apprehending more offenders, effectively prosecuting offenders, and meting out more appropriate sanctions.

The enormous danger lies in the possibility that these necessary changes will be mistaken for the ultimate solution to the problem. Alone, most legal and judicial changes will bring about no more than short-term solutions to the drunk driving problem. If we propose only such short-term responses, we may mislead the American public into believing that a few changes in law and administration will make the difference, and thereby squander the public confidence which is our most important ally. Laws alone will not dramatically change the drunk driving problem. The individual and society, as a whole, must be active partners in this effort if we are to see changes over the long haul that will be sustained by future generations. Society has shown itself to be willing; we must provide long-term leadership and innovative solutions.

The Commission's Blueprint for Change

In its deliberations and recommendations, the Commission has kept in mind both the great opportunity and the great danger. Our recommendations recognize the unique role that the individual, the society within which we live, and social institutions must play in changing behavior in order to reduce the carnage caused by driving under the influence. The most important recommendations deal with the need for grassroots citizen action, the creation of State and local task forces, the establishment of self-funding means, and the involvement of the private sector in long-term educational efforts.

We have tried to learn from past attempts, which have not been entirely successful, and tried to recognize the immense competition for the public's attention by many important social problems. We seek support for our recommendations on the basis of a comprehensive, realistic evaluation of what must be done and by whom if drunk driving is to be reduced in this nation.

The Commission believes that public officials at all levels of government must take action to eliminate or reduce the public health hazard of driving under the influence and should be primarily responsible for assuring legal and judicial innovation and program implementation. The Commission's recommendations in the areas of enforcement, prosecution, adjudication, licensing administration, alcoholic beverage regulation, systems support, and education and treatment represent a coherent, comprehensive program to serve as a baseline of public, official response to the problem. Prompt adoption of these recommendations will assure that the criminal justice system works swiftly and fairly to deter where possible and to treat and/or punish where necessary.

The Commission wishes to stress, however, that prevention is the only long-term remedy for the driving-under-the-influence problem. We are currently in the most fertile environment to undertake innovative educational efforts to prevent drunk driving. Past prevention campaigns had to begin by building public awareness of the drunk driving problem. Today, however, the general public's level of awareness of the drunk driving problem is already high, thanks to the efforts of grassroots citizens groups and enlightened public leaders. This high level of awareness implies that the public is ready for the next step: educational efforts that tell them how to prevent intoxication and drunk driving in their own social circles.

Such comprehensive, innovative efforts are contained in the Commission's recommendations concerning Public Awareness, Public Education, and the Private Sector. The program outlined in these recommendations must be sustained for at least a decade and must make use of every channel of communication in the home, in the work place, in voluntary associations, in educational institutions, and in the community to reach the widest possible

audience with the message that drunkenness and drunk driving are socially unacceptable and that each of us has the responsibility and the right to sustain an environment in which such dangerous practices will not be tolerated.

The Presidential Commission on Drunk Driving issues this report as a challenge to the nation to take action. We believe that the solution to drunk driving lies within the power of each American who chooses to support and act on the Commission's recommendations.

The Commission's Recommendations

In making its recommendations, the Commission acknowledges that driving under the influence is basically a State and local problem for which State and local solutions must be found. The Commission sees its report as a catalyst for such action and as a source of guidance for the States and localities as they develop effective, long-term programs to combat drunk driving. State and community officials have enthusiastically responded to the Commission's leadership in its Interim Report; this response must continue if we as a nation are to see a reduction in the deaths and injuries caused by drivers under the influence of alcohol.

The Presidential Commission on Drunk Driving believes that any program adopted to respond to the drunk driving problem should include six (6) key elements:

—First, drunk driving must be recognized as socially unacceptable. We must focus on bringing about changes in society's attitude of toleration toward drunkenness and drunk driving. The public must realize that the grave consequences of driving under the influence require each of us to take the personal responsibility for *prevention* in our own social circles.

—Second, since attitudes about drinking and driving are largely shaped within the community, and because the primary administrative responsibility for our efforts to combat drunk driving rests with the groups and governments at that level, efforts must have a *community focus.*

—Third, because attempts to deal with the problem involve a large number of governmental agencies and private groups, a *systems approach* must be employed to ensure that the activities of these groups are coordinated and interrelate smoothly to enhance their effectiveness.

—Fourth, in order to ensure that our laws play their proper role in discouraging the largest possible number of potential drunk drivers, States and localities should take a *general deterrence approach* in developing short-term remedies to the problem, with the focus on increasing the perception of risk of arrest.

—Fifth, to help develop personally responsible drinking and driving behavior, and to build a community consensus behind effective countermeasure programs, citizen support through *grassroots* groups must be encouraged.

—Sixth, because drivers under the influence are responsible for this problem with its great resulting human cost, it is appropriate that offenders should *defray* the costs of enforcement, prosecution, adjudication, treatment, and education.

The Commission recognizes that alcohol-related programs, especially those relating to enforcement and adjudication, can and should be made self-funding. Such a recommendation is included in this report. Furthermore, the Commission emphasizes the need for an adequate funding mechanism at the Federal level which would allocate monies to States and local communities, as well as to the private sector. This combined approach would ensure the timely and orderly implementation of the Commission's recommendations, resulting in a coordinated systems response to the national tragedy of alcohol-related crashes. We take note that federal incentive grants are currently available to States that adopt many of the Commission's recommendations, for example, enactment of a 21-year-old minimum legal purchasing age for alcohol.

The Commission further recommends that the Administration and the Congress consider not only general and traditional dedicated revenue sources, e.g., The Highway Trust Fund, but new dedicated funds as well.

The Commission's recommendations are organized according to the major elements contained in the Commission's program for combating drunk driving. The recommendations are presented under the following headings:

Public Awareness
Public Education
Private Sector
Alcoholic Beverage Regulation
Systems Support
Enforcement

Prosecution
Adjudication
Licensing Administration
Education and Treatment

A word of caution. The Commission believes that, to achieve a lasting impact, no one element of this program can be enacted by itself; a coordinated, decade-long commitment to a multifaceted approach must be taken by every State and community. No one suggestion or recommendation and no single aspect of the system can produce the results the Nation desires. The Commission realizes that the long-term impact which we all desire can be achieved only through a long process, culminating in the only guarantee of permanent change: changes in individual attitude and behavior.

Licensing Administration*

Suspension or revocation of drivers' licenses can be an effective deterrent to driving while under the influence. Studies in California and Washington show that license suspension was more effective than assignment of violators to alcohol education and/or treatment programs. If suspensions are imposed consistently and are highly publicized, this sanction can play an important role in reducing driving under the influence.

Cooperation among the States in sharing information on driver licensing and violations in order to stop those with revoked or suspended licenses from becoming licensed in another State is a necessity.

*This recommendation on Licensing Administration is but one of the 38 recommendations of the Presidential Commission. For further information on those recommendations or for an update on their implementation by the States the reader should correspond with: The National Commission Against Drunk Driving, 1400 K Street, N.W., Suite 750, Washington, D.C. 20005.

Recommendation—*Administrative Per Se License Suspension*

States should enact legislation to require prompt suspension of the license of drivers charged with driving under the influence, upon a finding that the driver had a BAC of 0.10 in a legally requested and properly administered test. The prompt suspension should also extend to those who refuse the test, as well as those who are driving in violation of a restricted license. Such suspension may be carried out by the arresting law enforcement agency, the court upon arraignment, or the administrative agency charged with license administration. There should be reciprocity among States to assure a driver's license suspension by the home State if the driver meets these conditions in another State.

Commentary

Some States have begun to use innovative methods to establish administrative penalties for driving under the influence. In 17 States today, *any* driver registering above 0.10 BAC has his or her license automatically suspended for 60–90 days or more *regardless* of the subsequent disposition of his or her case. If he or she refuses the test, his or her license is suspended for up to 180 days. This is a swift and certain sanction which significantly adds to the general deterrent effect of the control system. The individual is afforded the opportunity of a hearing within a specified period of time. The findings to be made at this hearing relate to whether the individual tested over the legal limit or whether the individual refused the test.

A different approach, used in New York for *repeat offenders*, provides for an immediate temporary suspension *pending* disposition of the charges. This system is carried out by the court where there is a finding of probable cause for the arrest and where there is a DUI conviction within the past five years. These two approaches also differ in their administration; the New York system is administered by the local criminal courts for the Motor Vehicle Department, while the other States' systems are administered by the State driver licensing agency.

Summary of Public Meetings Conducted by The National Commission Against Drunk Driving

As of January, 1986, 21 jurisdictions (including the District of Columbia) had in place administrative procedures to promptly suspend/revoke the driver licenses of alcohol offenders prior to court conviction. This has become known as administrative *per se*. Several other States take similar action, although it is conducted through the judicial system.

To study the issue, the National Commission Against Drunk Driving, in conjunction with the American Association of Motor Vehicle Administrators, conducted four public meetings on the value of administrative *per se* laws. The first three meetings were held in November, 1984, in States that already had the law—Delaware, Oklahoma and Utah. The fourth meeting, in February, 1985, was in Illinois where no law was in place (although it was adopted later in the year).

The hearings were designed

"1. To highlight the achievements of the pioneering States to find workable solutions to the drunk driving problem by administrative revocation;
2. To provide a forum for an open discussion of programs with their advantages and pitfalls; and
3. To establish a record for use by other jurisdictions seeking to adopt similar programs."

Strong advocates for administrative *per se* came forward to address the assemblage at each of the sessions. A review of the major presentations reveals that the police, courts, prosecutors, citizen organizations, and licensing agencies all support this administrative procedure. Comments of State officials and other authoritative persons may be summarized as follows:

The administrative *per se* law in each of the States is working well and has had a significant impact on crashes as well as a deterrent effect on potential drunk drivers. In Oklahoma, Governor Nigh and Public Safety Commissioner Paul Reed, Jr., reported an alcohol-related fatality reduction of 25% and alcohol-related crash reduction of 41%. District Attorney Steve Goldsmith (Indiana) reported a 36% reduction in alcohol-related fatals, and Gene Shepard, Iowa Commissioner of Public Safety, said that following adoption of this procedure Iowa motor vehicle deaths dropped to the lowest level since 1946.

One reason it has worked so well is because of the strong approval it receives from the police. This was reflected in comments by Lieut. Andy Stayton, Delaware State Police (DWI arrests tripled), Chief Bob Dick, Tulsa, Oklahoma (officer morale is boosted), and David Campbell, President, Utah Police Chiefs Association (the law has motivated officers to develop more and better DWI cases). Other police officers, all who commented favorably, were Oklahoma Highway Patrol Chief Jerry Biggers, Utah Highway Patrol Chief Duane Richins, Oklahoma City Police Chief Lloyd Gramling, Lieut. Jeff Townsend, Newark, Delaware; and others.

Legal issues were of prime interest to some of the participants, such as the constitutionality of the procedure and the need to meet due process requirements (Delaware Attorney General Charles Oberly; Utah Assistant Attorney General Bruce Hall; John English, private legal consultant) while the basic issue of establishing a clearly separated two track system was stressed by others (Delaware Director of Motor Vehicles Robert Voshell; Minnesota Special Assistant Attorney General Joel Watne). Professor John Reese, University of Denver Law School, addressed these issues as well as pointing out that the process should be carried out by the administrative licensing agency rather than the courts because:

a. Judges have no special expertise regarding driver training or rehabilitation,

b. Lack of coordination among the courts, and
c. Extensive court involvement is a waste of precious court resources.

Those who commented on the sureness and immediacy of licensing actions resulting from administrative *per se* were: Judge Norm Barron, Delaware Chief Magistrate; Dennis Reardon, Chief Magistrate of Delaware Family Courts; Judge Shonkwiler, Sixth Judicial Court of Illinois; General Counsel Steve Fabian, Oklahoma Department of Public Safety, and others. Frank Ianni, Director, Delaware Office of Highway Safety, pointed out that promptness was a primary reason for adopting the administrative *per se* procedures in Delaware where 75% of the offenders now are revoked in 15 days from the day of arrest.

Officials from States with these laws in place were most helpful in sharing their experiences. In particular, Gordon Sweitzer (Iowa Director of Motor Vehicles) and Edward J. Sterner (Delaware Director of Public Safety) stressed the importance of financial self-sufficiency. The costs of the program should be charged to the offenders through filing fees, reinstatement fees, alcohol taxes, treatment tuition fees, and by other means. Harold Peterson, Administrator of Minnesota Driver Services, and others discussed the importance of keeping forms and procedures simple and direct, and Larry Lunnen, Utah Commissioner of Public Safety, made a plea for comprehensive programs supported by a Statewide Uniform Traffic Ticket System to expedite the legal processes and eliminate defective forms in the courts.

In summary, the data presented and opinions expressed at these meetings overwhelmingly favored the administrative *per se* procedures that have been adopted by most of the States that have these laws; that is,

- The officer picks up the offender's driver license and issues a temporary driving permit and a notice of license revocation to become effective at a future date,
- An administrative hearing (or administrative review) is conducted promptly if requested within a designated number of days,
- If no hearing is requested, or if the hearing officer finds against the offender, the license revocation is imposed on the designated day, and
- If the offender believes the hearing was unjust or improperly conducted he may take legal action through the judicial system.

Do's and Don'ts on Administrative License Suspensions, and Other Issues*

James Latchaw, Traffic Safety Programs,
National Highway Traffic Safety Administration

Good morning, ladies and gentlemen. As a matter of definition, I will use the terms "suspension" and "revocation" interchangeably, as well as the terms "administrative suspensions" and "administrative *per se*." For those not familiar with the "*per se*" term, many States have "illegal *per se*" statutes that provide it is illegal for persons to drive with a designated alcohol concentration in their bodies, such as .10. This has since been applied to administrative suspension actions based upon the same concept.

It would be presumptuous of me to attempt to describe effective State programs in administrative license suspension when you will hear shortly from Joyce Emery, Forst Lowery, and Ted Hebert. Each of their States is actively conducting an operational suspension program and I urge that other States emulate them as soon as possible. The major difference between the three State programs you will hear about is the administrative review process in Minnesota that appears to significantly reduce the number of requests for formal hearings.

Most of the administrative suspension programs of the 19 States we studied last year, as well as the operational program that would follow from our model law, provide that:

- Upon arrest for DWI or a chemical test revealing an alcohol concentration of .10 or higher, the officer physically takes the offender's driver license certificate.
- The officer gives the offender a temporary driving permit and an official notice of license suspension to become effective within a designated period of time. The suspension notice also provides information on recourse available to the offender, such as the availability of an administrative review, a hearing or judicial review, or a hardship license.
- The officer then sends the license certificate and supporting documents to the State licensing agency.
- If no action is taken by the offender, the suspension becomes effective on the date indicated. If the offender requests an administrative review or hearing, appropriate due-process procedures are followed.

It is a legal precept that to be most effective, justice must be swift and sure. You may have heard it referred to as "certainty, severity, and celerity." Also, the most effective penalty for DWI of which we are aware is license suspension. Therefore, it is our responsibility to make suspension as quick and certain as possible.

Delays and impediments in the judicial systems of many States prevent this. In reviewing various State programs in my office, I have observed that some of them average 140, 170, or more days from the day of arrest to the day of license suspension. States with administrative suspension programs do it more quickly. In Delaware they suspend 77 percent of the DWI offenders within 15 days of arrest. Minnesota does it even more quickly, because Delaware provides 15 days for violators to request a hearing, and Minnesota provides for only 7 days. Minnesota officials tell me they revoke over 95 percent of the DWI offenders in that State after 7 days.

Also, in many States, there is no assurance the license will in fact ever be suspended. Due to continuances, plea bargaining, probation without judgment, delayed prosecution, diversion programs, failure to send conviction records to the licensing agency, and for other reasons, we find that a majority of the offenders in some States may never lose their licenses. When it becomes the duty of the arresting officer to secure the license certificate and issue a notice of suspension or revoca-

* As presented before the 10th International Forum on Traffic Records Systems

tion at the time of the arrest, as in most States that suspend administratively, we can expect that almost all will be suspended, and all will be treated equally.

The National Highway Traffic Safety Administration believes strongly in the efficacy of license suspension or revocation. Primarily this is because of two studies, one of them in California by Roger Hagen and the other in Washington State by Salzberg, Klingberg, and others. Both studies found the loss of license to be far more effective than other measures employed against drunk drivers, such as required attendance at driver improvement or alcohol remediation programs. In California the loss of license was found to reduce both crashes and violations for up to 4 years following the term of the suspension, when compared to other drivers with comparable records who did not lose their driving privileges. A more current study in North Carolina, reported early this year, further substantiated these findings. The California and Washington studies dealt with repeat offenders, whereas the North Carolina study was of first offenders.

There may be those among you who would ask, "Of what value is license suspension when most of the persons who lose their licenses continue to drive without one?" We agree that a large percentage, probably around 80 percent, of the persons who lose their licenses continue to drive. But this leaves 20 percent who *do not* drive, and I challenge you to name any countermeasure, other than full-time incarceration, that completely eliminates crashes and violations for a specific period of time, as does the loss of license for those persons.

However, we should be able to make suspension even more effective. About 2 years ago we contracted with the American Association of Motor Vehicle Administrators (AAMVA) for the development of a model enforcement program against suspended or revoked drivers. After studying earlier research, such as the use of a visible driver license, and the TAGS project of the Insurance Institute for Highway Safety that required the use of portable computers containing the vehicle registration numbers of cars owned by suspended drivers, the AAMVA decided that the method most likely to be used and to achieve success was that available to every State and community today—checking the licensing status of every driver contacted by the police in their normal course of duty.

This is based upon procedures presently used in Florida. I don't know how many suspended drivers are arrested in your State each year, but our data indicated that New York arrested 10,000 of them in 1982, Michigan arrested 20,000, and Massachusetts arrested 30,000 in that year. But Florida arrested 60,000, and the study revealed that even then many violators contacted by the police under roadside conditions remained undetected. Since then, the Florida program has been further improved, and they presently are apprehending more than 84,000 per year. I can mail you a copy of the report of that study if you wish.

Enforcement against these problem drivers must be strong, well publicized, and supported by an up-to-date records system. This means records integrity and accessibility. They must be accurate because a police officer will only let himself be caught one time arresting someone for driving under suspension, when in fact he is acting on faulty information from the driver records agency. Also, the records must be immediately accessible on a 24-hour 7-day-a-week basis or the records agency is not providing the level of service the police and the courts deserve.

Now let's talk about dollars. About a year ago the Congress passed a bill that provided funding for States with effective alcohol-related highway safety programs. This is known as the alcohol traffic safety incentive grant program, since the offer of funding is meant to serve as an incentive to States to improve their alcohol traffic safety-related programs, including State records systems. One of the basic criteria to qualify for these funds is for States to suspend the licenses of DWI offenders within an average of 45 days from the day of arrest. Many States still are unable to meet that criterion, and I suggest that a well-structured law that provides for administrative license suspension would accomplish this for them. Last week I called each State that uses an administrative suspension program, and every one assured me they would be able to meet the 45-day criterion.

The incentive grant program provides funds equal to up to 50 percent of a State's FY83 402 apportionment. If your State is of average size, it presently receives 2.2 million dollars per year in 402 funds. This means that if your State qualifies for the maximum incentive grant and joins the 16 States that already have so qualified, your State will receive over $1 million in additional highway safety funds, each year, for each of 3 years.

And that's not all. Earlier this year Congress authorized an additional amount equal to 10 percent of a State's 402 funds, for each of 3 years, to support comprehensive traffic records programs. The total amount for this purpose is $11 million, and that is approximately $200,000 per year for an average-size State. You can't spend it yet because

the money has not yet been appropriated, but you should be aware of it and prepare to submit your application following receipt of appropriate guidelines.

That's worth going for, but more important, these comprehensive program improvements are worth going for because they will reduce crashes and violations.

Congress also passed a bill this year that provides additional funds equal to 5 percent of the 1984 level of 402 and 408 funds, which averages out to about $100,000 for an average-size State. The qualifications for these funds are related to DWI penalties and the penalty for driving while suspended for an alcohol-related offense, but I'll not take time to describe them in detail here. It is enough that you are aware of these funds.

You all know of the carrot- and stick-approach. What I have described thus far is the congressional carrot. Congress also recently took action to encourage States to enact a uniform 21-year minimum drinking age. A percentage of highway construction funds will be withheld from States that do not establish 21 as the minimum age for purchase or possession of all beverages containing over one-half of 1 percent of alcohol by volume. What they have said is:

- If a State fails to adopt age 21 by October 1, 1986, 5 percent of the State's highway funds will be withheld.
- If age 21 still is not adopted by October 1, 1987, an additional 10 percent will be withheld.

We're talking about big bucks. For an average State this appears to amount to about $15 million over 2 years—$5 million the first year and $10 million the second. However, if in some future year age 21 is adopted by the State, the withheld funds will be made available.

This will require a joint rulemaking action by NHTSA and the Federal Highway Administration that we hope to be concluded sometime in December this year.

Those of you who know me know that I am neither an evaluator nor a traffic records technician, but I do know that accurate and complete records are essential to any effective highway safety program. I also know that those records must be readily accessible and in a form most useful to potential users. I'll give you an example.

In many of the States represented here today, to use a driver record for evidentiary purposes, the courts require that the record from the headquarters of the driver record agency be certified and sworn to by the agency head, and in many cases that when it is presented before the court an appropriate official from the records agency be there in person to submit it and swear to its completeness and accuracy. This makes it close to impossible for some States to provide the records services necessary to meet operational needs. To overcome this problem, a few jurisdictions have adopted laws that establish computer-generated printouts, without special certification, as legally acceptable for evidentiary purposes and at least one State, Florida, has established the legality of computer-generated records from remote terminals such as those located in the offices of the clerks of the county courts.

We are planning, within a few months, to develop a legal treatise on this issue of computer-generated printouts from remote terminals, whether located in-State or in States other than that where the record is housed. It should be printed and ready for distribution by next spring.

Also, I must be sure to mention two Research and Development evaluation projects we are cranking up, although it will be 2 or 3 years before results are available. One of these is an impact evaluation of "hardship" or "occupational" licensing. The other is an impact and administrative evaluation of suspension programs. The contract award process is only now underway, so don't expect results too soon.

I feel I am running out of time, and I would like to give you some "do's" and "don'ts" on administrative suspension programs. You may wish to keep them in mind as you listen to the speakers who follow me.

DO be wary of your State Administrative Procedures Act. These acts vary greatly from State to State, and you may find that after you have your program operating, a shrewd defense attorney ties you up in knots with it. Our model law, the Minnesota law, the Delaware law, and some others appear to deal adequately with it.

DO have the arresting officer serve the notice of suspension or revocation, issue a temporary license, and pick up the offender's license certificate. This, first, leaves no doubt that the legal notice has been served and overcomes potential problems of mail delivery of the suspension notice; second, it secures the license certificate immediately, thus overcoming the problem of trying to recover it by mail or the costs of recovery by personal service; and, third, it assures that due-process procedures are fully complied with, because the notice should describe what appeal rights the person has, the

availability or nonavailability of limited licensure, and other legal recourse.

DO attempt to achieve financial self-sufficiency for your program. This may help influence your legislature to adopt an appropriate law. It may be achieved by increasing your driver license reinstatement fee, the use of a hearing filing fee, or by other means. In some jurisdictions, the reinstatement fee for alcohol-related offenses now exceeds $100. In North Dakota, for example, the fee is $125, and they anticipate revenues from it of $480,000 per year.

DO plan and budget for an increased number of hearings. In States where it is advantageous to the offender, they have had a lot of hearings as a result of administrative suspensions. When it is not particularly to the violator's advantage, such as not providing for a stay of the suspension until the hearing has been conducted, fewer hearings are requested. We strongly recommend that you consider the use of administrative reviews such as used in Minnesota and upheld by the Minnesota Supreme Court.

DON'T locate the hearing for the convenience of the offender. The West Virginia law formerly required that hearings be conducted in the home county of the offender, and that the officer appear and testify. When the police found they were being subpoenaed to attend hearings in the far corners of the State, arrests went down. The hearing should be in the county of the arrest or other location chosen by the Commissioner or the director of driver licensing.

There is one final statement I should make before turning the podium over to Bob Voas, who will report to you on data from the current level of evaluation of some of these administrative suspension programs.

My wife told me that when she was a little girl she always thought of the Pope as the oldest person in the world. Possibly she looked upon him as a latter-day Moses or Methuselah. Nobody was older than the Pope. Then, when the current Pope was chosen, not too many months ago, she suddenly discovered that her own husband was older than the Pope. This not only was a shock for her, but she proceeded to tell all of her friends and relatives about it, and my age has become sort of a standing joke among our friends and acquaintances.

What I'm getting around to telling you is that I've been in the business for a long while. I entered highway safety in the driver licensing function in 1939, moved into traffic law enforcement as a highway patrol officer in 1943, and have fairly well divided my interest and energies between those two functions ever since. People like me, who have been in the field all this while, have seen many long, dreary years of frustration and lack of support.

Right now, highway safety is popular. A couple of weeks ago, at the 16th Annual Institute on Motor Vehicle and Traffic Law in Boulder, Colorado, one of the speakers said we are on a roll. MADD and RID and other citizen support groups are speaking up for us. Congress has been taking affirmative action. We have the attention of State legislatures. Now is the time for each State to demonstrate its own initiative, because this receptive environment will not last forever. There are some who believe it already has peaked out.

The Federal government doesn't want to force highway safety programs onto you, and you don't want it to. The way to forestall it is through State initiative. Each State should do its best to qualify for the funds I have described to you. You should:

- Improve your traffic records
- Improve your traffic records reporting systems
- Improve your training
- Join the Driver License Compact
- Join the Nonresident Violator Compact
- Adopt administrative suspension laws
- Adopt or tighten up your Uniform Traffic Ticket programs
- Professionalize!

These things don't require massive budgets, but they do require initiative and effort. Most of the cost of them might be covered by the funding sources I have reported to you.

Let us know how we can help you with any one or all of them and we will do our best for you, but you must show the initiative. If you don't know whom else to talk to about it, talk to me. You have my name. I don't have all the answers, but I'll try to point you to the right sources of information and help. I can send you information and materials, but you must show the initiative.

We will help you.

Administrative *Per Se* in Oklahoma*

Paul W. Reed, Jr.
Commissioner, Oklahoma Department of Public Safety

I'm excited and delighted to have the opportunity to speak here in Boulder. This gathering gives us as administrators an opportunity to visit and share the things we have learned and experienced during the process of a year and I think this kind of sharing and cooperation is the key to the future success of the administration of the law enforcement agencies within this country. This morning I have been asked to share with you the experience we have had in the State of Oklahoma as a result of the enactment of the .10 *per se* law and the legislation that requires immediate surrender of the driver's license if a person refuses to submit to a chemical test, or submits to a chemical test and has an alcohol concentration in excess of .10.

It has been 2 years since the advent of .10 *per se* law in Oklahoma and 1 year and 3 months since implementation of the immediate surrender of a driver's license at the time of arrest for driving under the influence.

In Oklahoma, as in many of your States, if a person refuses to submit to a chemical test, his driver's license is revoked for 6 months. If an individual submits to a chemical test and has a concentration in excess of .10, there is a 90-day revocation of the driver's license.

Until the passage of this new legislation, an individual only lost physical possession of his driver's license if he voluntarily surrendered it to us or if we happened to locate and stop him on the street at some later time. To say the least, this was haphazard at best; but it was the only system we had. This caused us a problem with reinstatement fees, because a person who had refused to surrender his driver's license at the time of revocation was the same person who would not voluntarily pay the reinstatement fee. We all know that money is something that is very important in government these days. The lack of it is even more important.

Now, if an individual is stopped and does not have a driver's license in his possession, the police officers merely run a check and find that the person is indeed under suspension. The lack of the driver's license is the officers' clue that something is wrong. In the past, the officers could not, as a practical matter, check on each and every driver stopped; therefore a great number of people slipped through the cracks of enforcement. Now the crack is much smaller, and consequently we have increased revenues to the point that the program is almost self-sufficient. Our legislature has jumped on the opportunity to let the individual that comes into the system pay for the operation of the system through the imposition of an $80 reinstatement fee for a person who is revoked for refusing a chemical test or having a .10 concentration. Now that we have a driver's license in our possession, we have more control over the collection of the reinstatement fee, because they don't get their license unless they pay the fee.

With the passage of all of this legislation, the question that I am asked most often is "Does the law have any effect on drinking and driving?" To say the least, I am pleased to answer that question with a resounding "yes." We have seen, through the last 2½ years, several interesting phenomena. For the short time between the passage of the .10 *per se* law in July 1982 and the license-seizure law in April 1983, our records and the statistics indicated very little difference in the incidence of drinking and driving.

I have long maintained that in order to be effective, punishment for a crime must be administered fairly, consistently, and—most important—swiftly. Through the years I have seen changes of the law that enhance penalties and punishment for various crimes. The effect of these changes has not been significant, and they lack the punch and impact that we had hoped they would have. While all of the enforcement action taken by the Oklahoma Department of Public Safety is administered fairly and consistently, sometimes the speed with which the actions occur leaves a lot to be desired.

*Presented before the 16th Annual Institute on Motor Vehicle and Traffic Law

Sometimes the abstract of conviction is not forwarded to us, or there is a delay in putting this information into the data bases for manipulation by the computers, and any number of other things that delay the imposition of the "punishment."

We also see in the criminal justice system that only infrequently is the punishment for a crime meted out in a swift manner. In the past, if a person was arrested for the crime of driving under the influence, he had to be processed through the arrest procedure and was put back into the social environment to await a trial. The individual might wait months or possibly a year or two before being tried by the court. If he was convicted, it was only then, after a lengthy wait, that any punishment was imposed upon him. If an appeal were to be taken from the conviction, there might be an additional time lag before the imposition of any sentencing.

As you can see, by the time punishment was finally inflicted, it bore no relation to an act that the person had committed several years before. Changing the punishment for the crime did not change the fact that punishment was not dispensed until a long time after the act had occurred. If we don't understand or don't remember what we have been punished for, the punishment does not seem to have as much effect. (This is the main fallacy that I see in the imposition of the death penalty.)

I always reflect back on the story of the father who had difficulty getting his older son to quit swearing. The father, after repeated attempts to get his son to quit his foul language by negotiation and counseling, decided that the only way for the young man to learn manners was to quit sparing the rod. He decided to punish severely and swiftly if the swearing occurred again. Sitting at the dinner table with his family one evening, the older son took a bit of his peas and said "I hate these goddamn peas." With that, the father without a word reached out and struck the boy with such force that he knocked the young man off his chair and left him lying on the floor. The younger son watched in disbelief, with his mouth wide open. The father looked at the younger son and asked him if he had anything to say, and the boy replied, "Nope, but I sure as hell ain't gonna eat any of those goddamn peas."

When Oklahoma passed the .10 *per se* law, nothing much changed from the standpoint of the violator adequately connecting the punishment to the violation. The law didn't have any real impact and we did not find a decrease in the incidence of drinking and driving.

It is extremely frustrating for me as an administrator when dealing with various law enforcement problems to attempt to curb the commission of the crime by increasing the penalties for various crimes and to find that it has little or no effect on the problem itself. It is this frustration that makes success so sweet.

In April 1983, the Oklahoma Department of Public Safety began enforcing this new legislation that provided for immediate seizure of a driver's license for a person who refused to submit to a chemical test or who had an excess of 0.10 concentration of alcohol in the blood. We had media coverage plus we were the benefactors of an advertising campaign that we had not really expected. In fact, it was the best type of advertising that one could hope for. The "word-of-mouth advertising" took over and has had the effect of spreading the word very quickly. It seems that the most talked-about thing in law enforcement in Oklahoma is the effect of the "new DUI law" on the drinking driver. People tell people! People always have a story they want to tell about what happened to them when they were arrested, and it seems as if these stories spread rapidly around the bars and clubs of the State, and, people have become acutely aware of the problems others have faced when their driver's licenses were immediately taken from them on the night they were arrested.

The results are, to say the least, exciting. We found a significant decrease in the incidence of drinking and driving. Our review of the statistics indicated that there was approximately a 9% decrease in the number of people arrested for driving under the influence between 1982 and 1983. The numbers further showed that the average concentration for both breath test and blood test decreased by the approximate amount of .01. This is a significant decrease considering that the number of miles driven, licensed drivers, and licensed vehicles have each increased substantially.

Traffic fatalities in Oklahoma decreased by 212, for approximately a 20% reduction over the year. There was a 30% decrease in the fatalities where drinking was involved. When we looked at the numbers on all accidents, we found the greatest change in the 2-year comparison. There was a 41% decrease in drinking-driving involvement in all accidents.

We are also very pleased with the impact that this new legislation has had on our young people. There has been a reduction in the number of incidents of alcohol-related personal-injury and fatality accidents in the age group 16 through 24.

Since 1943 the deaths in Oklahoma on the

highways have increased consistently, with only a slight reduction in the number of fatalities during the time period when the 55-mile-an-hour speed limit was implemented. *Never* in Oklahoma's history have we had a reduction of fatalities like we had in 1983. There is no doubt in my mind, there is a direct correlation between the implementation of the immediate surrender of driver's license and the reduction in DUI's and the inevitable reduction in traffic fatalities.

We went to our lawmakers and asked for stiffer legislation; the legislature responded affirmatively, gave us what we asked for, and thereby created the ability to conform to Ma Bell's directive to "reach out and touch someone." The law enforcement community reached out and touched. The prosecutors have prosecuted and the judges have pounded the gavel in support of this new legislation in view of the public outcry for an end to the drinking-driving problem in the State of Oklahoma. The Supreme Court is helping us with decisions such as the *California v. Trombetta et al.* decision of June 11, 1984, when it ruled that the due-process clause of the fourteenth amendment does not require that law enforcement agencies preserve breath samples in order to introduce breath-analysis tests at trial, and thus California's failure to preserve breath samples for respondents did not constitute a violation of the Federal Constitution.

The concerted efforts by all parts of the justice system have indeed helped to curb the number of deaths in Oklahoma at the hands of the drinking driver.

There seems to be something for everyone in our law. The defendants have had additional protection and safeguards instilled into the system by the passage of a provision that requires the police agencies in our State at the time of the testing to collect and secure for a period of 60 days samples of the breath or blood of the arrested individual. The defendant may then have this sample tested by an independent laboratory of his choice.

We have come a long way and have a long way to go. We are succeeding and on the way to continued success and we cannot give up. We must proceed, we must unite, and we will conquer.

Prehearing License Revocation of Drinking Drivers—The Minnesota Experience*

Joel A. Watne, Special Assistant Attorney General

Minnesota's Implied Consent statute, Minn. Stat. §169.123, was first enacted in 1961.[1] As with most statutes of this type, it provided that the operation of motor vehicles implied consent to testing to determine blood alcohol content where there was probable cause to believe that the suspect had committed a DWI violation; gave the driver the option (but not the "right") to refuse to submit to testing;[2] and provided for a six-month revocation of driving privileges for those who refused to submit to testing.

Any driver could have a prerevocation hearing by simply sending a letter requesting a hearing to the Commissioner of Public Safety within twenty days after receipt of the notice of proposed revocation.[3] The statute provided a two-tiered judicial review: an evidentiary hearing before a municipal or county court judge, and, if the driver wished, a de novo trial on appeal to the district court, with a jury.[4] There were no administrative hearings.

All litigation on implied consent cases is handled for the Commissioner by the Attorney General. This has the distinct advantage of having a unified prosecution policy in effect in all 87 counties of the state, and avoids having both DWI and Implied Consent cases dismissed as parts of plea bargains under the threat of facing lengthy trials in both proceedings.

In 1971, the legislature had amended the statutes to provide for a ".10% BAC per se" violation, the use of preliminary screening tests, and allowed use of the implied consent statute without arrests. One of the ASAP programs, in Hennepin County (Minneapolis and suburbs), resulted in a significant increase in arrests with which the courts were not adequately equipped to deal. This increased the pressure for plea bargaining to the point where about half of all DWI charges in the county were routinely reduced, usually to "Careless Driving," even where the driver had a long history of prior arrests.[5]

In 1976, one legislator, State Senator Alec Olson, a former congressman and later lieutenant governor, became outraged over the extent to which plea bargaining was nullifying the DWI statute, allowing repeat offenders to avoid official identification as such, and avoiding the loss of driving privileges. He proposed that licenses be revoked where drivers did submit to testing which disclosed a blood alcohol content of .10% or more. The suggestion won quick approval, and was enacted as Minn. Stat. §169.127 (1976).[6]

Under this statute, where a test was taken under the implied consent statute and produced a reading of .10% or more BAC, the license would be revoked for 90 days. The time was set deliberately

*As Presented at the 15th Annual Institute on Motor Vehicle and Traffic Law.

[1] New York adopted the first such statute in 1953, and Illinois became the 50th state to adopt an implied consent statute in 1973.

[2] There are early cases from California, Arizona and other states indicating that such provisions do not confer a "right to refuse," but merely acquiesce in refusals rather than risk the violence that might accompany efforts to obtain blood tests by force from uncooperative drivers. While the result—no test—is the same under either theory, there does not seem to be any sound reason why such a "right" should be conceded unless the legislation is drafted in a manner which refers to it as "right." A refusal to recognize a "right" to refuse avoids philosophical problems with respect to imposing sanctions for exercising a "right," and should make it easier to overcome "there-but-for-the-grace-of-God-go-I" syndrome in enforcing the sanctions provided in the statute.

[3] This was increased to thirty days in 1978.

[4] The unwieldy system is reportedly the result of a compromise between a governor who insisted on having an implied consent law with jury trials, and a state senator who insisted that jury trials be available at some point. The compromise satisfied nobody except perhaps attorneys for drinking drivers. County and Municipal Court judges often felt that they are doing nothing but presiding over depositions in which the driver found out the strengths of the Commissioner's case, then appealed and presented his defenses as a surprise before a jury. District Court judges felt that such minor matters were a complete waste of their time and beneath their considerable dignity.

[5] With about 50 prosecuting jurisdictions in the county, the vigor with which DWI cases were prosecuted varied considerably, as did the skill with which it was done. Some municipalities contracted with private law firms to provide prosecutorial services, and it was not uncommon for the law firms to use that business to provide trial experience to their newest members.

[6] After some initial disbelief that anyone would suggest such an outlandish idea, the reaction came to be "Why didn't anyone think of this sooner?" The idea of administratively revoking licenses where an officer believes that a person was intoxicated but refused testing was well-established. It is even more logical to revoke licenses where a test has confirmed the officer's belief.

at half the revocation time required for a refusal in order to give drivers an incentive to submit to testing. An effort was made to have the hearings made purely administrative, with review by the courts on the record, but a last-minute compromise threw the cases back into the judicial system, where they were handled in the same way as cases involving refusals, with the exception that the two-tier trial procedure and jury trials were eliminated. Instead, there was a court trial, with appeals on the record to the district court.

In 1978, the legislature again turned its attention to the DWI problem and made several significant changes. One was to eliminate the "blood alcohol content" concept, and to replace it with "alcohol concentration."[7] This eliminates arguments that blood tests are more reliable because they are "direct" tests of "blood alcohol content" rather than "indirect" tests: the breath and urine tests are now "direct" tests of the "alcohol concentration" of the substance tested.

In 1978, Minn. Stat. §169.127, the "implied consent test revocation" statute, was repealed and its substance merged into Minn. Stat. §169.123, so that all revocations, whether resulting from refusals or tests, were made under the implied consent statute. At the same time, the hearing procedure was reformed to eliminate jury trials and trial de novo on appeal to district court. All hearings were still to a court, but all appeals would be on the record only.

The most significant change enacted in 1978 was the introduction of a procedure in which police officers act as agents of the Commissioner to serve immediate notice of proposed revocations. The statute authorized officers to seize the licenses of drivers who refused testing or who tested .10% alcohol concentration or more, and to issue them a form which served as (a) a notice of the proposed revocation, (b) a self-executing order of revocation if no request for hearing was filed within thirty days, and (c) a temporary license during that thirty-day period if the person held a valid license.[8] The original intent of this legislation was to reduce the frequency with which drivers were avoiding conviction for driving after revocation by merely denying that they had received the notice of revocation.

The 1976 provision for revoking licenses of those who tested .10% BAC or more had significantly increased the workload of the attorney general's office. Between 1973 and 1976, three attorneys were assigned to handle the entire caseload, which grew from about 250 pending cases in 1972 to over 600 pending cases in 1975, and reduced to about 460 in 1976 before the new statute took effect. The new statute involved the office with potentially all DWI cases instead of the 15%–20% who were refusing tests, and the backlog of pending cases reached 2,000 by 1978. The number of attorneys assigned to the implied consent cases grew to seven "permanent" assignments, supplemented on an ad hoc basis by other staff members with implied consent experience.

The 1978 amendments caused a substantial increase in the caseload. By January 1, 1982, it had risen to 4,800 pending cases. Meanwhile, budgetary problems had reduced the complement of attorneys assigned full-time to implied consent cases to four, supplemented by new staff members, each of whom would serve 90 days with the division to get trial experience. This caused some decrease in the "batting average" as inexperienced attorneys lost cases which could have been won, and also tended to increase the number of cases in which it was necessary to make an actual court appearance.[9]

One reason for this increase was a positive one: the increase in arrests. Being able to seize the license from the driver and issue him the notice of proposed revocation gave officers a sense that their work would have some clear result. Even if their prosecutor was prone to reduce or dismiss charges, the driver would face the revocation, and would immediately lose the convenience of carrying a license with his picture on it. It is probably the only additional form to which police officers have not voiced objection. On the contrary, between the enactment of the statute and its effective date, officers were calling up impatiently demanding to know when they could get those forms so that they could start seizing licenses from drivers.[10]

Even though drivers could still postpone the revocation indefinitely with a hearing request, the loss of the plastic license had an immediate impact: it was not very satisfying to be unable to produce the plastic license when asked for identification when cashing checks. It might be impossible to rent

[7] Minn. Stat. §169.01, Subd. 61 (1982) states: "Alcohol concentration" means (a) the number of grams of alcohol per 100 milliliters of blood, or (b) the number of grams of alcohol per 210 liters of breath, or (c) the number of grams of alcohol per 67 milliliters of urine.

[8] As a practical matter, the form could not normally be used in blood and urine test cases because of the delay before test results could be obtained. In those cases, the test result was (and still is) reported to the commissioner, and notice of the proposed revocation is sent by mail.

[9] Some attorneys made it a practice to wait until they got to court to see if they would be up against an experienced lawyer or a "rookie." If it was an experienced attorney, and if the officers showed up, they would waive the right to a hearing.

[10] One officer told me that, in his view, the only improvement on that procedure would be to adopt a procedure under which the officer is issued an apple basket for the back seat of his squad car and drivers would be instructed to throw their licenses into the basket.

a car. And the paper temporary license, if produced when stopped by another officer, could help resolve doubts against the driver and improve his chances of being arrested for another DWI offense instead of being let go with a warning.

Even though about 85% of hearing requests were later withdrawn prior to a hearing, it was necessary for the Commissioner's Attorney General's staffs to devote thousands of hours of time processing literally thousands of files each year. Through 1981, while resources dwindled, the caseload continued to rise at a rate of about 100 cases a month, as about 900 cases were closed out and replaced by a thousand new ones.

It became apparent that the greatest economy could be achieved by eliminating the vast array of cases that existed solely because hearing requests were filed to postpone revocations while the defense tried to sort out the options. The simplest way to do this would be to borrow the prehearing revocation procedure used by Massachusetts and upheld by the United States Supreme Court in *Mackey* v. *Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979).

Several other events then happened to come together to facilitate the statutory change. Both the Attorney General and the incumbent Governor, who were expected to be opponents in the 1982 gubernatorial race, wanted to do something decisive to attack the problem of the drinking driver. MADD got organized in Minnesota, as a part of the nationwide tide of outrage. And Danny Roman Kramarczyk provided a horrible example to dramatize the need for action: while awaiting trial on two DWI (and two implied consent) cases, he killed two ladies, aged 89 and 85, who were helping each other home from church just before Christmas, while he was driving with an alcohol concentration in excess of .10%.[11]

By agreement between staffers for the Governor and Attorney General, the Governor proposed changes in the DWI statute itself, while the Attorney General proposed changes in the implied consent statute. Both proposals were largely drafted by the Attorney General's staff. News media hoping to find controversy in the proposals were disappointed when the Governor and Attorney General had nothing but praise for each other's proposed bills. The local leadership of MADD had not yet committed itself to any other program, and strongly supported both the Governor's DWI proposals and the Attorney General's implied consent bill. These two bills were combined into a single bill in the senate, and, with some additional proposals, emerged with a unanimous vote.

The chief DWI amendment was one which made a second offense within five years, or the third within ten years, a gross misdemeanor.[12] Longer revocations for repeated violations were also written into the statute, largely codifying administrative policies already in effect.

The primary change in the implied consent statute was the substitution of prehearing revocations for prerevocation hearings. Under the new statute, the officer seizes the license, as before, and serves notice of the impending revocation, as before. However, the revocation takes effect seven days later, instead of thirty days later, and cannot be delayed by seeking a hearing.[13]

Because of budgetary limitations, no request was made to take all implied consent hearings out of the judicial system and have them made administrative. However, to satisfy the speedy review considered necessary to due process for a valid prehearing revocation system, a "two track" system for review has been set up.

"Administrative review" is provided under Minn. Stat. §169.123, Subd. 5B (1982). This consists largely of having a Driver Safety Analyst review the police reports and whatever the driver has submitted. Since few drivers actually do have any legitimate defense, and almost none of them provide a real alternative account of the incident for consideration, few drivers prevail at this stage.[14] Administrative review is available at any

[11] The other two cases involved hitting a school bus which was unloading children, and an unsuccessful attempt to elude pursuing Minneapolis police officers.

[12] Minnesota has not been a state with severe criminal penalties. The initial statute, in 1911, made the offense a misdemeanor. In 1927, all DWI's were made gross misdemeanors with mandatory jail time. To avoid jury trials, which were not needed on misdemeanors at that time, and to increase the likelihood of conviction, the offense was reclassified as a misdemeanor in 1937. The level of offense remained the same for subsequent offenses, although a minimum of ten days in jail was required for second offenses until 1978, when it was repealed because it was avoided or ignored so much that it was a joke in many counties. Until August 1983, the maximum penalty for misdemeanors was $500 and 90 days in jail; and for gross misdemeanors, $1,000 and a year in jail. The maximum fines have now been raised to $700 and $3,000, respectively.

[13] The legislature was asked to have the revocation effective ten days later, and individual legislators wanted it effective immediately. The seven-day compromise allows the driver time in which to undertake the steps needed to qualify for a limited license for work purposes. However, there is a practical reason why it would be preferable to have a ten-day period: it allows more time for the officer's report to get mailed to the Commissioner and to have the revocation entered on the computer several days after it takes effect, increasing somewhat the credibility of the revocation order: if the driver is stopped by another officer, a license check may show him "valid" when he already knows he is under revocation.

[14] The majority of requests for administrative review seem to be purely boilerplate forms submitted by attorneys, and consist of nothing but an assertion that not a single element of a proper implied consent case exists. While they denounce the administrative review as a farce, they do not take it seriously enough to attempt to have it be anything else.

time the revocation is still in effect. It is available whether or not the driver seeks judicial review.

Judicial review is obtained under Minn. Stat. §169.123, Subd. 5c (1982). The driver is required to file the petition for review with the court, paying the filing fees for ordinary civil actions. The petition must state "with specificity" the grounds on which the revocation is contested. The petition must be filed within thirty days after receipt of the notice and order of revocation form.[15]

Another important change in the 1982 implied consent law was elimination of a case law requirement that blood tests be offered in all cases. The officer decides what test will be offered, and the driver either submits or faces the six-month revocation for refusing. The exception is that if the officer chooses the blood test, a driver may refuse that without facing revocation unless the officer then offers another test. In general, most drivers are offered the breath test only.[16]

The 1982 implied consent procedures were immediately challenged as allegedly violating due process. The Minnesota Supreme Court rejected all attacks and found the statute constitutional in (*Heddan* v. *Dirkswager*, 336 N.W.2d 54 (Minn. 1983)).

In 1983, the Legislature paid additional attention to the drinking driver. Minnesota was one of the states in which, by court decision, evidence of refusals could not be admitted into evidence in DWI trials. Within hours of the United States Supreme Court's decision *in South Dakota* v. *Neville*, _____ U.S. _____, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983), the first of several bills was introduced to amend the statutes to provide for admission of such evidence. In *State* v. *Willis*, 332 N.W.2d 180 (Minn. 1983), in which the 1982 language authorizing juries to be informed that no test was involved or necessary was upheld, the Chief Justice and two other justices indicated that they felt it was time to overrule the prior decision, even though the precise issue was not before them, on the strength of *Neville*. The statute was amended effective August 1, 1983. It has not faced the immediate challenge which followed the 1982 amendments, possibly because would-be appellants can read the concurring opinions in *Willis* and discern the handwriting on the wall.

Minnesota's statutes relating to violations resulting in death were also strengthened. For years, Minnesota has had a "criminal negligence" law, making it a felony to operate a motor vehicle in a grossly negligent manner resulting in death. While alcohol involvement was not an element of the offense, it was a rare case that did not involve an inebriated driver.

There were drivers who escaped conviction because they could not be shown to have acted in a "grossly negligent" manner. There are also cases in which victims are severely injured but do not die which were not covered.

Once again, one highly publicized horrible example helped to galvanize public opinion, resulting in amendments to both the "criminal negligence" and "hit and run" laws. "Criminal negligence" has been renamed "criminal vehicular operation," and makes it a felony to kill or seriously injure a person either as a result of gross negligence or a DWI violation. "Hit and run" offenses involving injury and death have also been made felonies.

The horrible example in 1983 was Craig Swanson, a high school swimming coach from Elk River, Minnesota, who struck and killed two young girls, one of them a swimmer on his team, and left the scene of the accident. Because he was not apprehended until several days later, no alcohol concentration test result was available. He denied any alcohol involvement, although he had been involved in a half dozen or more DWI charges over the years in Kentucky, Wisconsin, and Minnesota. He also professed to having swerved to avoid another vehicle, to having never seen the girls, and to having believed that he had hit a deer. His case was pending during the legislative session.[17]

The various amendments over the years have given Minnesota a DWI law which covers every square inch of the state, and applies to all "driving," "operating," and "physical control." The elimination of the qualifying adjective in "actual physical control" has been held to disclose a legislative intent to have the statute cover "the broadest possible range of conduct" and to be given

[15] This shifts the expense and work of filing cases from the Commissioner to the driver, saving tax dollars. The increased cost to the driver reduces somewhat the number of petitioners for judicial review: $38 in fees is more substantial than a 20 cent stamp. However, most petitions are boilerplate forms which allege that no element of an implied consent case exists.

[16] The only instruments used in Minnesota for evidentiary breath tests are the Model 900 and Model 900A Breathalyzers. They are about to be replaced with newer equipment using funds finally appropriated by the legislature in the wake of the RFI controversy. Requests have been made for newer equipment for years, but have always been the victims of budget cuts. One of the 1983 revenue measures raised the reinstatement fee charged after DWI and implied consent revocations from $30 to $100, part of which was earmarked to pay for the new instruments. It is anticipated that the first instrument will be in place by Thanksgiving, with all 185 Breathalyzers in the state to be replaced in about a year.

[17] The jury found him "not guilty" on the criminal negligence charge, but found him guilty of "leaving the scene of an accident," a misdemeanor. He has appealed that conviction, even though his attorney argued to the jury that he was guilty of that offense, but not of criminal negligence. The school board demanded his resignation, which he resisted, despite rather strong community feeling. A compromise was reached in which he resigned in return for a payment of a sum of money less than would be expended in litigation if he were discharged.

"the broadest possible effect." *State, Department of Public Safety* v. *Juncewski*, 308 N.W.2d 316, 319 (Minn. 1981). The implied consent law likewise applies to every square inch of the state, and is not limited in its application to "streets and highways." As a result, while the statute is clearly not the most severe or draconian in the land, it is probably as comprehensive in its scope as any, and probably remains second to none in the likelihood that the apprehension of a DWI violator will result in the loss of driving privileges.

Together with increased training of police officers and some official encouragement, this has encouraged officers on the street to step up their efforts to arrest drunk drivers. In 1982, for example, a Blaine, Minnesota, officer arrested over 300 drunk drivers; while the State Patrol's leader had 272, an increase over his 1981 output, when he and two of his partners each arrested over 200 drunk drivers.

There have also been some well-publicized arrests of public figures, including legislators, county officials, television personalities, etc., which have helped to bring about an increasing perception that the law will be applied to any driver, regardless of status.[18]

There have been a variety of private efforts to increase public awareness of the DWI problem, as well as to deal with the broader problem of the abuse of alcohol and other drugs in society. In Grand Rapids, Minnesota, for example, there has been a program to revive the old Burma Shave signs with jingles dealing with the DWI problem. Another program produced posters advertising the DWI law to be hung on gas pumps and in windows of service stations. Public service messages were produced for television which included the Governor, a judge, a doctor, and head of MADD. Newspapers and broadcast media have shown a greater interest in the subject.

In Hennepin County, the bench adopted a policy of requiring a minimum of two days in jail for all persons convicted of DWI or any offense reduced from DWI. The Ramsey County (St. Paul and suburbs) bench decided to attack the problem by scheduling DWI trials within thirty days. Anoka County (northern suburbs) adopted two days' incarceration in a concentrated DWI education program which Ramsey County is now adopting.[19]

There has been a general increase in public awareness. Anecdotes abound about people paying attention to their own use to avoid placing themselves in violation of the statute, arranging for one member of a party to avoid drinking so they can have a sober driver, etc. One driver had over fifty sets of keys made for his car. When he feels he has had too much, he throws away the set of keys, takes a cab home, and returns with one of his spare keys when sober.

As with every other publicized crackdown on the drinking driver, there has been an associated decline in traffic fatalities. Minnesota had 763 reported traffic deaths in 1981, for the lowest total in about twenty years. In 1982, this was reduced to 581, a figure lower than that achieved within any of the last thirty years. While this drop is approximately 30%, it is possible that the "rebound effect" observed in all other situations has already set in: in May 1982, fatalities were running about 45% behind the 1981 rate.

Attached are a pair of charts provided by Forst Lowery of the Minnesota Department of Public Safety, a member of the Presidential Commission on Drunk Driving, comparing figures of traffic deaths with the number of alcohol-related license revocations per 100 million vehicle-miles from 1967 through 1982 in Minnesota. As those charts indicate, an increase in alcohol-related driver license revocations has coincided with a decrease in traffic deaths.

For the Attorney General's office, the procedural changes were a lifesaver. Because a revocation cannot be delayed by a hearing request, the number of new cases per month has dropped from a thousand to between 100 and 150. The backlog of 4,800 pending cases on Jaunary 1, 1982, was reduced to less than 800 on January 1, 1983. By August 1, 1983, the caseload was down to 605, and dropped to 576 on September 1, 1983.

Where do we go from here? We know that no statute, no matter how comprehensive, can provide a perfect solution to the problem. At present, there is a task force at work trying to come up with the perfect statute. At the same time, another task force is trying to come up with long-range programs to prevent DWI violations by changing public attitudes towards the use of alcohol and its use in combination with motor vehicles.

There are some who call for increasing the severity of penalties. While more severe sanctions are certainly legally permissible, the present feeling

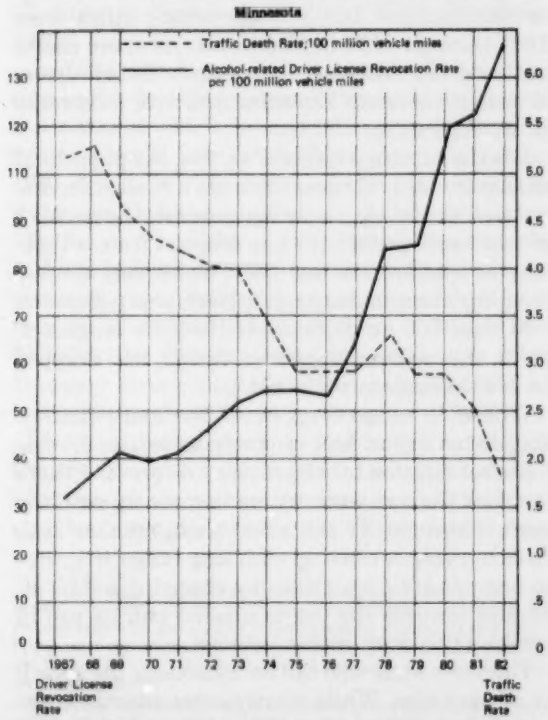
[18] There does remain, of course, the practical problem that in certain municipalities, there are unwritten rules prohibiting the arrest of home town people, etc., although some progress seems to be made as more new officers, with more training, go to work.

[19] As a result of retirements and replacements on the Hennepin County bench, the "two day rule" is no longer followed by all judges. Ramsey County found that setting cases for trial in thirty days did not result in as many quick pleas of guilty as anticipated, requiring the rescheduling of cases which could not be tried on the date set because older cases had priority.

seems to be that the objective should be a statute which is severe enough to have some sort of deterrent effect, while not making it so severe that police officers refuse to arrest, prosecutors refuse to prosecute, juries refuse to convict, and judges refuse to sentence because of their perception that the punishment set forth in the statute is out of proportion to the perceived seriousness of the offense: when burglars get probation, some people find jailing drunk drivers rather hard to swallow.

There are some specific areas in which the statute can be improved to make its application more certain without making it more severe. For example, the misdemeanor presence rule can be completely abrogated. Such a change, and others which eliminate "technical defenses," speed up the processing of DWI suspects, reduce required paperwork, etc., can make it easier for officers to do their work, and encourage them to arrest more drunk drivers.

As in the past, we in Minnesota will try to benefit from the experience of other jurisdictions in improving our own programs, while sharing our experiences with other interested jurisdictions.



For those who feel that we take the problem too seriously and have laws or proposals that are too harsh, there are three decisions from the courts of other states which may be quoted in response.

For example, an Indiana motorist convicted of one "reckless driving" and two DWI violations within ten years was banned from driving for ten years under that state's habitual offender statute. In rejecting his appeal, the court stated:

> The state cannot wait until the mangled and lifeless body of a child lies silently by the roadside before it attempts to remove a reckless or drunken driver from its list of licensed drivers. The potential for the destruction of life and property is too great to permit irresponsible people who have demonstrated a disregard for the safety of themselves and others, to drive on public thoroughfares. If Owens wants to prove that he is a safe and responsible driver, he will have that opportunity after ten years have elapsed.

Owens v. *State ex rel. Van Natta*, 382 N.E.2d 1312, 1317 (Ind. App. 1978).

As to the severity of criminal penalties, one can suggest a review of *State* v. *Beavers*, 382 So.2d 943 (La. 1980), in which the Louisiana Supreme Court held that a penalty of ten years' imprisonment at hard labor is not cruel, excessive or unusual punishment for a person convicted of DWI four times within five years.

More recently, the Nebraska Supreme Court reviewed the 20-month to five-year sentence of a driver with a long record of alcohol-related offenses convicted of DWI as a "third offender," declared his excessive sentence claim to be fatuous, and observed: "A sentencing judge is required to have only an open mind, not an empty one." *State* v. *Christensen*, 331 N.W.2d 793 (Neb. 1983).

Minnesota

Traffic Deaths and Alcohol-Related Driver License Revocations

1967–1982

Year	100 million vehicle miles traveled	Traffic deaths	Rate	Alcohol-related driver lic. revocations	Rate
1967	187	965	5.17	5,977	32
1968	199	1,060	5.33	7,431	37
1969	208	988	4.75	8,471	41
1970	224	987	4.41	8,634	39
1971	234	1,024	4.38	9,678	41
1972	249	1,031	4.14	11,303	45
1973	252	1,024	4.02	13,047	52
1974	246	852	3.47	13,325	54
1975	256	777	3.03	13,731	54
1976	270	809	3.00	14,251	53
1977	281	856	3.05	17,741	63
1978	288	980	3.40	24,357	85
1979	290	881	3.04	24,966	86
1980	285	863	3.03	30,481	107
1981	286	763	2.67	32,043	112
1982	294	581	1.98	36,024	126

The last sentence, of course, applies not only to judges, but also to all others involved in the entire system, from the police officer on the street to the driver license administrator dealing with administrative sanctions.

Avoidable Pitfalls in Administrative Suspension Programs*

Alton Chrystal, Director, Office of Driver Licensing
Iowa Motor Vehicle Division

I cannot think of an analogy that better relates to administrative D.W.I. suspensions than a recent experience of mine as a juror in my home community of about 250,000 people. Each weekday morning for one month I reported for duty with some 150 other persons. From this group juries were selected for the ten district court judges and somehow justice was dispensed. The process is slow, cumbersome, awkward, and costly, and sometimes decisions are not made, but the system with all its shortcomings is so far ahead of that which is second best there can be no comparison. The same is true of administrative D.W.I. suspensions. The law in most states is not perfect, but the concept is a proper approach to a nationwide problem that has plagued prosecutors, law enforcement officers, and driver license administrators for years.

During this discussion today, I will use the term suspension interchangeably with revocation, and D.W.I. interchangeably with O.W.I. and D.U.I. Hopefully, this will help me to clearly present an objective overview of the shortfalls often prevalent in administrative suspension statutes, as I see the problem. While I have not experienced being arrested for driving while intoxicated, I have some experience in the area, having served as a uniformed Iowa Highway Patrol Driver License Examiner for five years and two years as a Department Hearing Officer. I was a Road Trooper for ten years and promoted through the ranks to Assistant Chief of the Iowa State Patrol during my thirty years of service. Since retirement from the State patrol I have spent the past four years as Chief Driver Examiner and Office Director for Iowa's Office of Driver Services.

Certainly, there are many opportunities to fail in the implementation and administration of such a law. However, I firmly believe that administrators should carefully examine the following concerns as being most relevant to the development of a successful program.

The forms and reports required of law enforcement officers must be carefully drafted to avoid errors, reduce paperwork, and obtain the support of the police community. Driver license administrators must go to the field to sell the concept and train police. Law enforcement, not unlike other professions, is inundated with paperwork. Theirs, however, is often more difficult as they frequently work under adverse and extremely stressful conditions. Both the police and driver licensing administrators need to work diligently to obtain legislation to eliminate unnecessary restrictions on the police and driver license personnel. An example of this is the requirement of some states that the form be notarized. In my opinion, this is totally unnecessary. Recently a New Mexico notarizing official wrote, "My stamp was not on all copies of the affidavit and if I had used the seal there would have been no problem. Previously, this was correctable, but not now. The case is lost. It was a real bad accident and now there is no punishment. It bothers us when they don't deal with the merits of the case." To require notarization is an administrative pitfall.

It is essential that administrative suspensions operate on a two-track system. Those jurisdictions that are required to rescind or modify their action as a result of a criminal court acquittal suffer one of the most serious pitfalls of all. To be effective, the administrative suspension must operate totally independent of the D.W.I. trial court. Obviously, there will be challenges through the courts as to the legality of the arrest, the testing, and for other reasons, but to allow the criminal court disposition to interface with the administrative suspension will result in a pitfall that will erode the effectiveness of the statute.

One of the more common errors, in my judgment, with administrative suspension programs is the period of time for which the license is revoked. It

*As Presented Before LIFESAVERS 4

is not uncommon to make the period of suspension rather lengthy. However, administrators, and others, are reminded that public opinion will have a great impact on what actually occurs. The cries for work permits will increase as the period of suspension increases. The bleeding hearts will remind us of the loss of jobs, of hungry families, and the cost to society created by unemployment. I am not sure what the ideal period of suspension should be for the first, second, or subsequent D.W.I. arrest, but I do believe there is a far greater hue and cry for work permits when the suspension period exceeds six months. Work permits, generally speaking, are an administrative suspension pitfall and, if issued at all, should follow a period of complete or hard suspension. This philosophy is substantiated by studies documenting the beneficial effects of hard suspensions by no less than three states.

I can think of no greater problem with administrative suspensions than the area of hearings. Any state administrator who is trying to develop and has enacted legislation to implement a D.W.I. administrative suspension program must carefully evaluate the power of the defense attorney's lobbying effort. Then he must try to convince friendly legislators that the number of hearings should be limited, that the cause for hearings should be clearly statutory, and that the hearings must be held within a given time frame to avoid lengthy stay orders and to avoid hearings ending up as a "fishing" expedition for the defense counselor. It is not uncommon, in those states which do not have favorable legislation in this area, to have D.W.I. cases pending in the hearing process for one to two years. In my state, the offender can ask for two hearings, a director's review, obtain three stay orders, and at least two continuances before exhausting his administrative remedies. The process often exceeds one year. Fortunately, however, the numbers are infinitesimal. Nonetheless, in Iowa the hearing process is one of the pitfalls that I would caution you to avoid.

Minnesota has demonstrated that hearings can be held expeditiously without staying the suspension and has done so effectively. It is important that hearings be held in the venue of the offense rather than in the county of residence of the offender. This will avoid the necessity of peace officers having to travel long distances if subpoenaed. I would also suggest that failure to authorize telephone hearings would be an error. It is an inexpensive procedure for the department and it saves a great deal of overtime payments for the police.

And while the hearing process must be restricted and promptly disposed, likewise the suspension must be affected within the shortest time possible. In Minnesota it is reported that 90% of those arrested for D.W.I. lose their licenses within 7 days. In Iowa approximately 75% lose their licenses within 20 days, the remaining 25% are those who are delayed through our cumbersome hearing process. I do not have data as to the time it takes to get to court, but since the suspension is administrative, the court decision is not particularly relevant. It is interesting to note that less than 50% of those arrested are ever convicted, yet between 97% and 98% have their driver license revoked.

There can be, in my opinion, no good argument for exempting juveniles from administrative D.W.I. suspensions. This is one occasion in our way of life where the person driving must be made accountable for his actions. Juvenile courts and juvenile officers must stand and be counted. No other cause results in more injuries and deaths to young people than the automobile and alcohol is disproportionately represented in accidents involving juveniles. Their records must be recorded and, like all drivers, suspensions, revocations and driving improvement programs must generate from these records. I can find no argument for exempting juveniles from any jurisdiction's administrative suspension program. To do otherwise is, in my opinion, a miscarriage of justice and a grave pitfall to avoid.

States implementing administrative suspension programs can avoid the errors of some by advanced planning. An example would be to name the types of breath testing equipment that are acceptable, either by statute or administrative rule. Likewise, the training for the operation of this equipment ought to be clearly stated. The same goes for drawing and testing blood and urine samples. The procedures must be clearly spelled out to avoid unnecessary case losses and suspension recissions.

Also, sanctions must be taken against those who refuse to provide a body substance for testing. A reasonable approach that has worked in some jurisdictions is to revoke the license for a longer period and to refuse the person, regardless of need, a hardship license during the revocation period. Under an administrative suspension process the driver license should be picked up and the suspension notice issued by the officer at the time of arrest. This procedure is applicable to both those who refuse to test and those who test and fail.

And lastly, administrators must continue to sell

the program. Press releases must be informative and accurate as well as being positive. Members of the judiciary must be made aware of the success of the program. We, as administrators, must keep in mind that many members of the judicial family do not agree with the philosophy of the state administratively suspending driver privileges, however successful. Likewise, legislators must be kept current. As is usually the case, there will be those legislators who will try hard to water down good programs and give public cry to federal intervention without having first evaluated the proposal or reviewed the federal government's participation.

I sincerely believe "the momentum" is in our favor; alcohol-related fatalities per 100 million miles appear to be on the downward swing, while society and the press support vigorous and innovative D.W.I. enforcement. The courts have, for the most part, been sympathetic, and for those of us in administrative and responsible positions to not move in the direction of an effective administrative suspension program would be the most serious of all pitfalls.

A Model Law on Administrative License Suspensions/Revocations and a Comparison of State Laws

This model law, first published in 1984, includes the same concepts of administrative license suspension/revocation that have more recently been incorporated into the Uniform Vehicle Code. Both statutes provide for administrative action prior tc court appearance, for the arresting officer to physically take possession of the offender's driver license and replace it with a temporary permit and notice of suspension or revocation, and provide for due process through provisions for an administrative hearing.

If this model law is adopted, it is suggested that the following be added to further improve and strengthen it:

1. "The administrative procedures that have been established under this statute (license confiscation, temporary permit, etc.) shall apply equally to persons who refuse to comply with the provisions of the State's implied consent law."

   "When a nonresident is found in violation of this statute, his/her operator's license shall be confiscated and all other procedures shall apply the same as though the person were a resident of this State."

   "Administrative suspensions/revocations imposed by other jurisdictions against drivers who are residents of this State shall be treated in the same manner under this State's driver improvement process as though supported by a court conviction."

   "The arresting officer and/or alcohol test technician shall not be required to testify at administrative hearings, except in response to a subpoena which may be requested by either the State or the accused offender."

2. Also, as recommended by the Uniform Vehicle Code, the alcohol concentration threshold to determine intoxication under the State's illegal *per se* law, as well as the model administrative suspension law, should be established at .08 (rather than .10 as found in Section 2 of the model law).

Model Revocation on Administrative Determination (ROAD) Law

With Comments and Implementation Guidelines

§ 1 – Purpose of this act

The purpose of this Act is the following:

(1) To provide safety for all persons using the highways of this state by quickly revoking the driving privilege of those persons who have shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies; and,

(2) To guard against the potential for any erroneous deprivation of the driving privilege by providing an opportunity for administrative review prior to the effective date of the revocation, and an opportunity for a full hearing as quickly as possible after the revocation becomes effective; and,

(3) Following the revocation period, to prevent the relicensing of those persons until the department is satisfied that their alcohol problem is under control and that they no longer constitute a safety hazard to other highway users.

Comments and Implementation Guidelines

General. The statement of purpose is important because it helps to establish the state's strong interest in promoting highway safety by quickly removing drunk drivers from the highways. The significance of the state's interest is one factor which the courts weigh in determining the validity of summary revocation procedures.

* * * * * * *

§ 2 – Revocation on administrative determination

(a) The department shall revoke the license of any person upon its determination that the person drove or was in actual physical control of a motor vehicle while the alcohol concentration in the person's blood or breath was 0.10 or more. For purposes of this Act, alcohol concentration shall mean either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(b) The department shall make a determination of these facts on the basis of the report of a law enforcement officer required in section 3 of this Act, and this determination shall be final unless an administrative review is requested under section 8 or a hearing is held under section 9.

(c) The determination of these facts by the department is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any revocation under this section.

Comments and Implementation Guidelines

General. This section provides the basis of Revocation On Administrative Determination (ROAD). Instead of waiting for the criminal adjudication process to result in a conviction, the department makes its own independent determination of the same facts, and revokes if it appears to be warranted.

ROAD provides for revocation rather than suspension because at the conclusion of a period of license revocation, the license is not automatically returned. Instead, the

person may apply for a new license which may be granted if the person is found to be qualified. See the definitions of "revocation" and "suspension" in section 12, and the provision on license restoration in section 7. Whenever a license is withdrawn due to an offense relating to the use of alcohol or drugs, it is important that the department determine that it will be reasonably safe to allow the person to drive before it issues a new license.

Alcohol concentration. This definition in subsection (a) is taken without revision from UVC § 11-902.1 (a) 5 (Supp. 1979). The definition is vital. It must not be omitted from the law. It should not be modified except with the assistance of competent experts in the field of chemical testing.

The definition allows the chemical test results to be expressed directly as concentration in either the blood or the breath. Many older chemical test laws allow test results to be expressed only in terms of the blood alcohol concentration (BAC). Where breath tests are used under those laws, the test results must be converted to be expressed in terms of blood alcohol levels. No such conversion is necessary under the ROAD law.

It is especially impo.tant to the ROAD concept that breath testing be utilized, and that the accuracy and speed of the results should be maximized. This will enable the law enforcement officer, in appropriate cases, to give the revocation notice and take possession of the drivers license while the person is still in custody. This is important to the success of the ROAD approach.

Subsection (a). Revocation is mandatory under this section upon a finding that the person drove a motor vehicle while having an alcohol concentration of 0.10 or more.

Subsection (b). ROAD allows the department to base the revocation on the police officer's report alone, if an administrative review or hearing is not requested.

Subsection (c). This subsection makes it clear that the revocation under ROAD is an administrative action which is completely independent of the adjudication of the criminal charges. An acquittal in criminal court will have no effect upon the revocation.

* * * * * * *

§ 3 — Report by law enforcement officers

(a) A law enforcement officer who arrests any person for a violation of (insert code reference — see Note below) shall immediately forward to the department a sworn report of all information relevant to the enforcement action, including information which adequately identifies the arrested person, a statement of the officer's grounds for belief that the person violated (insert code reference — see Note below), a report of the results of any chemical tests which were conducted, and a copy of the citation and complaint filed with the court.

(b) The report required by this section shall be made on forms supplied by the department or in a manner specified by regulations of the department.

Comments and Implementation Guidelines

Note. At the two points indicated in subsection (a), reference to the state code section which prohibits driving while having an unlawful alcohol concentration should be inserted.

General. Under the current laws of most states, the department receives records of convictions and of implied consent refusals. The department would be unaware of most drunk driving enforcement contacts until a conviction is reported. This ROAD section provides the mechanism for getting information to the department immediately concerning all arrests for driving with an unlawful alcohol concentration.

Subsection (a). The subsection requires the officer to forward the kind of information which the department will need to determine whether to revoke the license.

The officer's report must be sworn. This is consistent with the practice in most of the comparable state laws, and in most state implied consent laws. Some states require that the report be "certified." Such certification might be accomplished by affixing immediately above the signature on the report a statement that any false statement in the report is punishable as a criminal offense. This statement, together with the signature of the officer, would constitute certification.

Subsection (b). In developing the forms and/or regulations required by this section, the department should consider encouraging the utilization of copies of documents which must be prepared by the enforcement officer for other purposes, whenever feasible. The forms and regulations should also provide for the combination of this report with the officer's report of a refusal to submit to chemical testing, in appropriate cases.

* * * * * * *

§ 4 — Notice of revocation

(a) Upon receipt of the report of the law enforcement officer, the department shall make the determination described in section 2 of this Act. If the department determines that the person is subject to license revocation, and if notice of revocation has not already been served upon the person by the enforcement officer as required in section 5, the department shall issue a notice of revocation.

(b) The notice of revocation shall be mailed to the person at the last known address shown on the department's records, and to the address provided by the enforcement officer's report if that address differs from the address of record. The notice is deemed received three days after mailing.

(c) The notice of revocation shall clearly specify the reason and statutory grounds for the revocation, the effective date of the revocation, the right of the person to request an administrative review and a hearing, the procedure for requesting an administrative review and a hearing, and the date by which a request for an administrative review must be made in order to receive a determination prior to the effective date of the revocation.

(d) If the department determines that the person is not subject to license revocation, the department shall notify the person of its determination and shall rescind any order of revocation served upon the person by the enforcement officer.

Comments and Implementation Guidelines

General. Sections 4 and 5 of ROAD provide two methods for serving the notice of revocation. In most cases, the notice will be served personally by the enforcement officer. Where for any reason that is not done, section 4 provides that the department will serve the notice by mail. Section 4 also specifies the minimum content of the notice.

Subsection (a). If the department determines that a license should be revoked, and if the notice has not already been given by the enforcement officer, the department issues the notice.

Subsection (b). There are several important elements here. First, the department must send the notice to the address shown on the department's records. The licensee has a legal obligation to keep the department apprised of a current address, and the department is entitled to treat that as the address to be used to give a legal notice. Nevertheless, the address provided in the officer's report is likely, as a practical matter, to be more current. If the two addresses differ, ROAD requires mailing a notice to both. ROAD does not specify the type of mail to be used, leaving that to the discretion of the department.

ROAD creates a presumption that the notice which is mailed is received by the person three days after it is mailed. This presumption allows the process to continue, even

where there is no evidence of actual notification. The notice of revocation should specify the effective date of the revocation, which would be 18 days after the notice is mailed — three days for the mail, and 15 days after the notice is presumed to be received.

Court rulings vary from state to state on the question of the necessity of actual notice. Court rulings in your state should be carefully considered in developing implementation procedures for this section. For example, if a revocation will be without effect in your state unless actual notice is given, the department should use a form of mail which will supply some evidence of notification such as certified mail with return receipt. The presumption that a mailed notice is received after three days will not hold up if your state is one which requires actual notice. It should be a part of your law, nevertheless, because it allows the department to specify the revocation effective date in the notice, but it should not be relied upon for more than that. The implementation procedures should provide for continued attempts to give the notice through alternative methods until the department has evidence of actual notice.

The best way to deal with the problem of actual notice is to maximize the use of notices issued by enforcement officers under section 5. This would be done by using chemical test procedures which provide immediate results. If service of the notice must be made under section 4, some problems are probably unavoidable, especially in those states which require actual notice.

Subsection (c). This subsection specifies the minimum content of the notice of revocation. It applies to notices served under either section 4 or section 5.

The notice of revocation should include all of the following information: clear notice that the person's drivers license and privilege to drive in this state is revoked; that the revocation is effective on a specified date; the reason for the revocation, including the time and place of the arrest, and the offense charged; that the person has the right to an administrative review and/or a hearing to contest the department's determination; that a timely request of administrative review will result in a review of the revocation before it becomes effective, but that neither the request for an administrative review nor a request for a hearing will result in a delay of the effective date of the revocation; that the person is required to surrender the license card to the department immediately, and will receive a temporary license valid until the effective date of the revocation; the address of the department office where the license may be surrendered and a request for an administrative review or a hearing may be filed; that the period of revocation is three months for a first offender, and one year for others; and that following the period of revocation the person may make application for a new license, if qualified at that time, and if the person's alcohol problem is under control.

Subsection (d). This subsection specifies that if the department determines that revocation is not warranted, it must notify the licensee.

* * * * * * *

§ 5 — Notice of revocation served by enforcement officer

(a) Whenever the chemical test results for a person who is being charged with a violation of (insert code reference — see Note below) show an alcohol concentration of 0.10 or more, the officer, acting on behalf of the department, shall serve the notice of revocation personally on the arrested person.

(b) When the law enforcement officer serves the notice of revocation, the officer shall take possession of any drivers license issued by this state which is held by the person. When the officer takes possession of a valid drivers license issued by this state, the officer, acting on behalf of the department, shall issue a temporary permit which is valid for 15 days after its date of issuance.

(c) A copy of the completed notice of revocation form, a copy of any completed temporary permit form, and any drivers license taken into possession under this section, shall be forwarded immediately to the department by the officer.

(d) The department shall provide forms for notice of revocation and for temporary permits to law enforcement agencies.

Comments and Implementation Guidelines

Note. At the point indicated in subsection (a) reference to the state code section which prohibits driving while having an unlawful alcohol concentration should be inserted.

General. We anticipate that most of the notices of revocation would be served under the provisions of this section.

Subsection (a). This subsection establishes very clear criteria for certain action by the enforcement officer. When the officer has obtained chemical test results showing an alcohol concentration of 0.10 or more, the officer must serve the notice of revocation on behalf of the department. If the test results are available immediately, the officer will be able to serve the notice while the person is still in custody. If the results are available later, the officer may be able to serve the notice when the person appears in court for proceedings relating to the criminal prosecution.

Subsection (b). At the same time the revocation notice is served, the officer takes possession of the person's drivers license. This is one of the most important aspects of the law. Although it is certainly possible to revoke a license without recovering possession of the drivers license card, such a revocation will be more difficult to enforce. Accordingly, an attempt is generally made to secure possession of a revoked drivers license. This can be a very difficult and time consuming process, however. This ROAD subsection should alleviate much of the difficulty in securing possession of revoked licenses.

Under the ROAD provision, only licenses issued by the state where the arrest is made are picked up. A state cannot revoke the license issued by another state; it can only revoke the nonresident's operating privilege in the state.

The most serious problem involved with taking possession of the drivers license card while the license remains valid is that it leaves the person without the most effective means of driver identification. The temporary permit which is substituted for the drivers license will be significantly less effective in identifying the licensee; it will have much less recognition as a valid drivers license; and it will be much more susceptible to counterfeiting and other kinds of fraudulent use. We have included this concept in ROAD because of the significant advantage of securing the drivers license at the time of arrest, and because the duration of the temporary permit should be very brief. Nevertheless, we would encourage further study to develop an alternative means of securing possession of revoked licenses. One concept which should be studied involves stamping or punching the drivers license to indicate that it is void after a particular date, and then returning it to the licensee. The District of Columbia law incorporates a similar concept, although the punch which is used does not place a date on the license.

The temporary permit which is issued is valid for 15 days. This is consistent with ROAD section 6 which provides that the revocation is effective 15 days after the notice is served.

Subsection (c). This specifies only that copies of all the documents must be forwarded to the department either at the same time as the initial report, or later after the notice is served.

Subsection (d). The department must provide forms for the notice of revocation and the temporary permit to appropriate law enforcement agencies.

The forms should be so designed that when completed by the enforcement officer, the notice of revocation form will meet the requirements of section 4, and the temporary permit will contain all of the relevant restrictions and descriptive information contained on the drivers license.

Several states are using a single form for the notice of revocation and temporary permit. While this may be a very convenient form, it results in a temporary permit which has few attributes of a drivers license. We recommend that the temporary per-

mit form be designed to be as effective as possible in identifying the licensee and making the connection between person and driving record, in providing recognizable evidence of a driving privilege issued by this state, and in preventing counterfeit and fraudulent use.

* * * * * * *

§ 6 – Effective date and period of revocation

(a) The license revocation shall become effective 15 days after the subject person has received the notice of revocation as provided in section 5, or is deemed to have received the notice of revocation by mail as provided in section 4.

(b) The period of license revocation under this section shall be as follows:

1. The period shall be three months if the person's driving record shows no prior alcohol or drug related enforcement contacts during the immediately preceding five years.

2. The period shall be one year if the person's driving record shows one or more prior alcohol or drug related enforcement contacts during the immediately preceding five years.

3. For purposes of this section, "alcohol or drug related enforcement contacts" shall include any revocation under this Act, any suspension or revocation entered in this or any other state for a refusal to submit to chemical testing under an implied consent law, and any conviction in this or any other state for a violation which involves driving a vehicle while having an unlawful alcohol concentration, or while under the influence of alcohol, drugs, or alcohol and drugs.

(c) Where a license is revoked under this section and the person is also convicted on criminal charges arising out of the same occurrence for a violation of (insert code reference — see Note 1 below), both the revocation under this section and the revocation under (insert code reference — see Note 2 below) shall be imposed, but the periods of revocation shall run concurrently, and the total period of revocation shall not exceed (the longer of the two revocation periods).

Comments and Implementation Guidelines

Note 1. In the space indicated in subsection (c), a reference to the state code section which prohibits driving with an unlawful alcohol concentration should be inserted.

Note 2. In the second indicated space in subsection (c), a reference to the state code section providing for license suspension or revocation following a conviction for driving with an unlawful alcohol concentration should be inserted.

Subsection (a). The subsection specifies that the period of revocation begins 15 days after the revocation notice is received.

Subsection (b). The subsection specifies the period of ROAD revocations. For a first offender, the license is revoked for a period of three months.

For the person who is a repeat offender, the revocation period is one year. A person is a repeat offender if the record shows one or more alcohol or drug related enforcement contacts within the past five years. Prior contacts would include any prior ROAD revocation, any conviction for driving while under the influence in this state or another, and any suspension or revocation for refusing a chemical test in this state or another.

In order to implement this provision, department driver records would have to be maintained for the period necessary to determine repeat offenders — we have recommended five years. The department should also give effect to records generated in other states, incorporating them into records maintained by the department. UVC § 6-106 (c) (1968) provides the legal foundation for doing so, and should be adopted if the state has no comparable provision now.

It is important to consider how the ROAD revocation periods compare with other suspensions and revocations related to drunk driving. If the ROAD revocation is longer than an implied consent revocation, for example, the ROAD law may serve as an inducement to test refusals. That would be very undesirable.

Subsection (c). This subsection deals with the relationship between the ROAD revocation and the conviction revocation based upon the same offense. Most states have a provision comparable to UVC § 6-205 (2) (Supp. 1979) requiring revocation (or suspension) on the basis of a conviction for driving while under the influence. (If your state law provides for suspension rather than revocation, the references in this subsection should be revised accordingly). Subsection (c) specifies that both of the revocation periods are to be imposed, but that they run concurrently, and the total period of revocation imposed is equivalent to the longer of the two periods. Thus, assuming that the period of revocation under ROAD is three months, and the period of revocation based upon a conviction is six months, the maximum period of revocation based upon the same offense would be six months. This would be true regardless of when or in what order the two revocations are imposed. The time during which the license is revoked under the earlier revocation is credited to the later revocation when it becomes effective.

* * * * * * *

§ 7 — Restoration of license

(a) The periods of revocation specified by section 6 of this Act are intended to be minimum periods of revocation for the described conduct. No license shall be restored under any circumstances and no restricted or hardship permit shall be issued during the revocation period.

(b) Following a license revocation, the department shall not issue a new license or otherwise restore the driving privilege unless and until the person presents evidence satisfactory to the department that the person's problem with alcohol use is under control, and that it will be reasonably safe to permit the person to drive a motor vehicle upon the highways. No driving privilege may be restored until all applicable reinstatement fees have been paid.

Comments and Implementation Guidelines

General. This section specifies the conditions for restoration of the driving privilege revoked under ROAD. It makes it clear that no privilege may be restored prior to expiration of the revocation period.

Subsection (a). The basic goal of ROAD is to revoke the license quickly, and for an adequate period of time to impress the licensee with the seriousness of the offense and the resolution of the state to take firm, immediate, responsive action. We believe that the issuance of a limited privilege on the basis of hardship considerations at a time when the license would otherwise be revoked would seriously undermine that goal. The three-month period of revocation for a first offender under ROAD is a relatively short license deprivation, given the seriousness of the offense. Many states specify revocation of six months to one year for this offense. This relatively short revocation period has been selected in the belief that it is better to completely deprive the person of the driving privilege for a short period than to restrict that privilege to necessary or occupational driving for a longer period. We urge the states to treat this three-month revocation period as a minimum period of total withdrawal of the driving privilege.

If the state decides to make available a limited license at some point during the revocation period, optimally, such a limited license would NOT be based upon hardship considerations. It will constitute a hardship for anyone to have the driving privilege

revoked, but that's not a good reason to restore the license. A better basis for restoring a limited driving privilege would be some evidence that the person has made progress in recognizing and correcting the alcohol or drug use problem which led to the offense. Many states are now requiring satisfactory completion of a prescribed treatment program as a condition to issuance of a limited license, rather than just returning the privilege to anyone who can show a hardship.

Subsection (b). This provision makes it clear that at the conclusion of *any* license revocation, the license is not automatically returned. Instead, the person must make application for a new license. Before issuing a new license, the department must be satisfied that it will be safe to permit the person to drive. This subsection places the burden on the person whose license has been revoked to provide evidence that the alcohol problem is under control and that it will be safe to permit the person to drive. The department should establish regulatory standards for restoring driving privileges in such cases.

The subsection also specifies that all applicable reinstatement fees must be paid before a license may be restored. The cost of administration of this program should be recovered from the drivers who make it necessary.

* * * * * * *

§ 8 — Administrative review

(a) Any person who has received a notice of revocation under this Act may request an administrative review. The request may be accompanied by a sworn statement or statements and any other relevant evidence which the person wants the department to consider in reviewing the determination made pursuant to section 2 of this Act.

(b) When a request for administrative review is made, the department shall review the determination made pursuant to section 2 of this Act. In the review, the department shall give consideration to any relevant sworn statement or other evidence accompanying the request for the review, and to the sworn statement of the law enforcement officer required by section 3 of this Act. If the department determines, by the preponderance of the evidence, that the person drove or was in actual physical control of a motor vehicle while having an alcohol concentration of 0.10 or more, the department shall sustain the order of revocation. If the evidence does not support such a determination, the department must rescind the order of revocation. The determination of the department upon administrative review is final unless a hearing is requested under section 9 of this Act.

(c) The department shall make a determination upon administrative review prior to the effective date of the revocation order if the request for the review is received by the department within eight days following service of the notice of revocation. Where the request for administrative review is received by the department more than eight days following service of the notice of revocation, the department shall make its determination within seven days following the receipt of the request for review.

(d) A request for administrative review does not stay the license revocation. If the department is unable to make a determination within the time limits specified in subsection (c) of this section, it shall stay the revocation pending that determination.

(e) The request for administrative review may be made by mail or in person at any office of the department. The department shall provide forms which the person may use to request an administrative review and to submit a sworn statement, but use of the forms is not required.

(f) A person may request and be granted a hearing under section 9 without first requesting administrative review under this section. Administrative review is not available after a hearing is held.

Comments and Implementation Guidelines

General. ROAD specifies a two-step administrative review and hearing process. This section describes the first step, an administrative review. Section 9 describes the second step, a full administrative hearing.

The "administrative review" described in this section is not a hearing. Rather, it is a review by the department of papers submitted by the officer and by the person whose license is subject to revocation. It affords the person a limited opportunity to state his side of the story, and to call attention to any obvious errors in the department's determination of the facts. If promptly requested, this review can be provided before the effective date of the revocation. The purpose of the review is to provide sufficient due process to prevent clearly erroneous license deprivations which could cause irreparable injury to the licensee.

Many of the existing laws provide for a stay of the suspension or revocation pending a full administrative hearing. Experience indicates that many of those states are unable to provide such hearings until 45 to 60 days following the arrest, or even longer. The volume of hearings is one factor in this delay. Experience also indicates that many drivers are requesting hearings only because of the stay of revocation which is afforded. This greatly inflates the volume of hearings, and causes further delays. The result of such factors is obstruction of one of the most basic goals of revocation on administrative determination — revoking the license and removing the driver from the highways quickly.

Hence, this revised version of the ROAD law provides for license revocation effective *before* a full hearing is provided. The revocation is effective 15 days after the person is served with the notice, generally at the time of arrest, and no stay is provided upon request for a hearing. The administrative review is intended to fill the due process gap pending the full hearing.

Several recent U.S. Supreme Court cases on the subject, especially *Mackey* v. *Montrym*, 433 U.S. 1 (1978), suggest that a law providing for immediate suspension or revocation without a prior hearing would be constitutional. Society has an important interest in getting dangerous drunk drivers off the highways immediately, and this would justify a summary suspension, especially if a post-suspension hearing is provided promptly. For an extremely well-documented and reasoned report which supports this conclusion, see J. Reese, "Summary Suspension of Driver Licenses of Drunken Drivers—Constitutional Dimensions," U.S. Department of Transportation (Nov. 1982), reprinted as an Appendix, *infra*.

The idea of a prompt administrative review followed by a later full hearing is drawn, with some revisions, from the Minnesota law. That law was recently upheld by the Minnesota Supreme Court against a claim that it violated due process of law. See *Heddan* v. *Dirkswager*, 336 N.W. 2d 54 (Minn. 1983).

Subsection (a). A person who has received a notice of license revocation under this Act may request an administrative review at any time prior to the date of an administrative hearing, and may accompany the request with a sworn statement or statements setting forth any facts he wants the department to consider. The person may also send other evidence (pictures, documents, etc.) in support of his case.

Subsection (b). The department is required to review its determination, giving consideration to the statements and evidence submitted by the person, and to the officer's sworn report. If the department determines on the basis of this review of the evidence in the record that the person did drive with an unlawful alcohol concentration, the revocation order is sustained; otherwise, it must be rescinded.

The review is not a hearing. The person does not appear before the department official who makes the determination. No witnesses are called. It is a paper review. It is just like the initial determination except that the record now contains papers submitted by the person whose license is being revoked.

Subsection (c). This subsection specifies the time restrictions applicable to administrative review. If the request for review is received by the department within eight days following service of the order of revocation, the department must complete the review before the revocation becomes effective. That gives the department eight days to receive the paper work from the police officer and any papers submitted by the licensee. Following that, the department has seven days to make the review and notify the licensee regarding its determination.

If the request is received more than eight days following service of the revocation notice, the department must complete the review within seven days after the request is received. In that case, the review will not necessarily be completed before the revocation becomes effective.

Subsection (d). The revocation becomes effective 15 days after the notice of revocation is served, regardless of whether or not an administrative review is requested. The only situation which results in a stay of the revocation under ROAD is a failure of the department to complete the review within the times specified in subsection (c). In that case, the revocation would be stayed until the review is completed.

Subsection (e). This subsection specifies how administrative review may be requested.

Subsection (f). This subsection makes it clear that a person need not request an administrative review first in order to request a full hearing. The administrative review step can be omitted, at the option of the person. However, administrative review may not be requested after a hearing has been held.

* * * * * * *

§ 9 — Hearing

(a) Any person who has received a notice of revocation may make a written request for a review of the department's determination at a hearing. The request may be made on a form available at each office of the department. If the person's drivers license has not been previously surrendered, it must be surrendered at the time the request for a hearing is made. A request for a hearing does not stay the license revocation.

(b) The hearing shall be scheduled to be held as quickly as practicable within not more than 30 days of the filing of the request for a hearing. The hearing shall be held at a place designated by the department as close as practicable to the place where the arrest occurred, unless the parties agree to a different location. The department shall provide a written notice of the time and place of the hearing to the party requesting the hearing at least 10 days prior to the scheduled hearing, unless the parties agree to waive this requirement.

(c) The presiding hearing officer shall be the commissioner or an authorized representative designated by the commissioner. The presiding hearing officer shall have authority to administer oaths and affirmations; to examine witnesses and take testimony; to receive relevant evidence; to issue subpoenas, take depositions, or cause depositions or interrogatories to be taken; to regulate the course and conduct of the hearing; and to make a final ruling on the issue.

(d) The sole issue at the hearing shall be whether by a preponderance of the evidence the person drove or was in actual physical control of a motor vehicle while having an alcohol concentration of 0.10 or more. If the presiding hearing officer finds the affirmative of this issue, the revocation order shall be sus-

tained. If the presiding hearing officer finds the negative of the issue, the revocation order shall be rescinded.

(e) The hearing shall be recorded. The decision of the presiding hearing officer shall be rendered in writing, and a copy will be provided to the person who requested the hearing.

(f) If the person who requested the hearing fails to appear without just cause, the right to a hearing shall be waived, and the department's earlier determination shall be final.

Comments and Implementation Guidelines

General. This section contains substantive and procedural provisions relating to the hearing.

Subsection (a). The request for a hearing must be in writing and may be made on a form supplied by the department. When the person submits the hearing request, an opportunity is provided to collect any license card not yet surrendered.

Subsection (b). The hearing should be held as quickly as possible, since the person has lost the driving privilege without having benefit of full due process.

It is necessary to provide adequate notice to the parties as to the time and place of the hearing. This must be provided sufficiently ahead of time to permit the person to prepare for the hearing. Hence, the ROAD law specifies a ten-day notice requirement. The parties may agree to waive the ten-day requirement, however, and this provision should be utilized as much as possible. Any such waiver agreement should be in writing.

The hearing is generally held at a place designated by the department as close as practicable to the place where the arrest occurred. The ROAD law formerly specified that it would be held in the county where the arrest occurred, but many departments use a regional rather than county structure and may not have an office in some remote counties.

The reason for holding the hearing close to the place of arrest is that this location is likely to be most convenient for any witnesses, especially for the arresting law enforcement officer.

The parties may agree to hold the hearing in a different location. One possibility here is that such an agreement could also cover related matters. Thus, the department might agree to hold the hearing in the offender's county of residence, provided that the offender will not object to witnesses from the county of arrest giving their testimony by telephone. The presiding hearing officer may have authority under subsection (c) to take testimony in that manner regardless of objections, but an agreement would resolve any problem. The use of telephone testimony in administrative hearings is becoming more common. It should be encouraged because it is a time-efficient manner for the police officers and other witnesses to testify.

Subsection (c). These are fairly standard powers given to a hearing officer in an administrative hearing of the type contemplated here. Note that the hearing officer is specifically authorized to make the final ruling. There is no need for the commissioner to make the final decision. There is no departmental discretion being exercised. The task of the hearing officer is strictly fact finding. The action of the department is mandatory, based upon the facts found to exist.

Subsection (d). The issue before the hearing officer is exactly the same issue which the department is required to determine under section 2. It is essentially the same determination which is made in the criminal court, although in the administrative hearing the standard of proof (preponderance of evidence) differs, and a less formal procedure prevails.

Subsection (e). A record of all evidence, testimonial and documentary, must be established at the hearing. Judicial review under section 10 is based solely on the record.

Subsection (f). If the person fails to appear at the hearing without any just excuse, the matter is treated as if the right to a hearing had been waived.

* * * * * * *

§ 10 — Judicial review

(a) Within 30 days of the issuance of the final determination of the department following a hearing under section 9 of this Act, a person aggrieved by the determination shall have the right to file a petition in (a court of record) in the county of (the county where the main office of the department is located) for judicial review. The filing of a petition for judicial review shall not stay the revocation order.

(b) The review shall be on the record, without taking additional testimony. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the department's determination.

Comments and Implementation Guidelines

General. This section specifies the substantive and procedural requirements relative to judicial review of the administrative determination following a hearing. Note that the person must exhaust the administrative hearing remedy before judicial review is available.

Subsection (a). Venue for judicial review is shifted to the county where the main office of the department is located. This is for the convenience of the department's attorneys. The petition for judicial review must be filed within 30 days of the final determination by the department. Such a petition does not stay the revocation order.

Subsection (b). The review is on the record established by the department at the hearing. The law does not permit the court to hold a new hearing or to redetermine the facts. The court's review is strictly limited to the grounds for reversing the department which are listed in this subsection.

* * * * * * *

§ 11 — Administrative procedure act

The administrative procedure act of this state [applies to the extent it is consistent with] [OR] [does not apply to] proceedings under sections 9 and 10 of this Act relating to the administrative hearing and judicial review.

Comments and Implementation Guidelines

General. Here the state should select one of the two options. Many of the state administrative procedure acts are full of complex provisions which have little relevancy to the type of hearing contemplated by this Act. The same is true as to the provisions regarding judicial review. Sections 9 and 10 of ROAD provide the essential legal framework for the kind of hearing and judicial review which is appropriate for the license revocations contemplated by the Act Each state needs to assess its own APA to determine whether its provisions should also apply to the administrative actions taken under this Act.

* * * * * * *

§ 12 — Definitions

The following words and phrases when used in this Act shall have the meanings indicated in this section:

1. **Department**. — The department of motor vehicles of this State.

2. **Drivers license**. — Any license to operate a motor vehicle issued under the laws of this State.

3. **License.** — Any drivers license or any other license or permit to operate a motor vehicle issued under, or granted by, the laws of this State including:
(a) Any temporary license or instruction permit;
(b) The privilege of any person to drive a motor vehicle whether or not the person holds a valid license;
(c) Any nonresident's operating privilege as defined herein.

4. **Nonresident's operating privilege**. — The privilege conferred upon a nonresident by the laws of this State pertaining to the operation by that person of a motor vehicle, or the use of a vehicle owned by that person, in this State.

5. **Revocation**. — The termination by formal action of the department of a person's license or privilege to operate a motor vehicle on the highways, which terminated license or privilege shall not be subject to renewal or restoration except that an application for a new license may be presented and acted upon by the department after the expiration of the applicable period of time prescribed in this Act.

6. **State**. — A state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a province of Canada.

7. **Suspension**. — The temporary withdrawal by formal action of the department of a person's license or privilege to operate a motor vehicle on the highways, which temporary withdrawal shall be for a period specifically designated by the department.

Comments and Implementation Guidelines

General. The definitions in this section are based on the driver licensing definitions in the *Uniform Vehicle Code*. They are basic terms which are already defined in the driver licensing laws of many states. They should be a part of the legal context into which the ROAD law fits. If they are not part of the overall driver licensing law, they should be specifically adopted as part of this Act.

* * * * * * *

Comparison of State Laws Revocation on Administrative Determination (ROAD)

This portion of the report compares the ROAD provisions and the laws of 19 states which provide for revocation or suspension on the basis of an administrative determination that the person drove a motor vehicle while having an unlawful alcohol concentration or while otherwise under the influence. The comparisons are in chart form. In the charts, the following abbreviations are used for the states:

Alaska	AK
Colorado	CO
Delaware	DE
District of Columbia	DC
Indiana	IN
Iowa	IA
Louisiana	LA
Maine	ME
Minnesota	MN
Mississippi	MS
Missouri	MO
Nevada	NV
North Carolina	NC
North Dakota	ND
Oklahoma	OK
Oregon	OR
Utah	UT
Washington	WA
West Virginia	WV

Comparison of Model Revocation on Administrative Determination Law and Comparable State Laws

	ROAD	AK	CO	DE	DC	IN	IA	LA	ME	MN	MS	MO	NV	NC	ND	OK	OR	UT	WA	WV
1. What license action is taken?					LS														LS	
Revocation	◇	◇	◇	◇	◇		◇			◇			◇	◇		◇			◇	◇
Suspension					◇	◇		◇	◇		◇	◇			◇		◇	◇	◇	
2. Is the action mandatory or discretionary?																				
Mandatory	◇	◇	◇	◇		◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇
Discretionary					◇															
3. What is the period of the license action?					LS	LS						LS								
First offense	3m	90d	ly	3m		180d	120d	90d	90d	90d	90d	30d	90d	10d	90d	90d	90d	90d	90d	6m
Second offense	ly	ly		12m			240d	365d	ly		ly	ly			ly		ly	120d	ly	10y
Third and subsequent offenses		10y		18m			ly							-					2y	life
d = day(s) m = month(s) y = year(s)																				
4. How does this period of license action compare with the period of suspension or revocation imposed for refusing to submit to testing under the implied consent law?		same	same	less	less	less	less	less	less	less	same	less	less	less	less	less	less	less	less	less
5. How does this period of license action compare with the period of suspension or revocation imposed following a conviction for driving while under the influence?		same	same	less	less	more	less	more	same	more	same	same	same	less	same	less	less	same	same	NA
6. The suspension or revocation is —					LS						LS		LS							
Temporary, pending adjudication of the criminal charges.						◇														
Independent of the disposition of the criminal charges.	◇	◇	◇	◇			◇	◇	◇	◇		◇		◇	◇	◇	◇	◇	◇	◇
7. The basis for the suspension or revocation is —					LS															
Evidence the offender drove a vehicle while having an unlawful concentration of alcohol in the blood.	◇	◇	◇			◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇		◇	
Evidence the offender drove a vehicle while under the influence of alcohol, drugs, or alcohol and drugs.				◇														◇		◇
8. Notice of suspension or revocation is generally given the offender by —														LS						
The arresting officer.	◇	◇	◇	◇	◇		◇	◇		◇	◇	◇	◇		◇	◇	◇	◇	◇	
The state driver licensing agency.						◇			◇											◇
9. The facts which trigger service of a suspension or revocation notice by the officer are —					LS	NA			NA					NA						NA
The officer has reasonable grounds to believe the person was driving a vehicle while under the influence.				◇			◇			◇										
The person was arrested and charged with driving a vehicle while under the influence.	◇		◇	◇	◇			◇				◇				◇				
A chemical test was conducted under the implied consent law.	◇	◇	◇				◇			◇	◇	◇	◇		◇	◇	◇		◇	
The test results indicate alcohol concentration exceeding the legal standard.	◇	◇	◇				◇	◇		◇	◇	◇	◇		◇	◇	◇		◇	
A determination is made that the person had an unlawful alcohol concentration or was under the influence of alcohol or drugs.																		◇		

LS — see the Law Summary for more information

NA — the law does not specify this information, or the question is not applicable

Comparison of Model Revocation on Administrative Determination Law and Comparable State Laws

	ROAD	AK	CO	DE	DC	IN	IA	LA	ME	MN	MS	MO	NV	NC	ND	OK	OR	UT	WA	WV
10. Does the arresting officer seize the person's drivers license and issue a temporary permit in its place?					LS				LS					LS						LS
Yes, whenever the officer initiates license action against the person.		◇				◇		◇		◇	◇		◇			◇				
Yes, as above, but only when the person holds a valid license issued by the state in which the arrest occurs.	◇		◇	◇			◇					◇			◇ LS		◇	◇	◇	
No, the officer does not seize the person's license or issue a permit.					◇				◇					◇						◇
11. The temporary permit issued by the officer is valid for the number of days shown.	15	7	7	15	NA	NA	20	30	NA	7	30	15	7	NA	20	30	30	30	45	NA
12. The facts which trigger the requirement that the officer make a report to the state driver licensing agency are –					NA	LS		NA						NA						
The officer had reasonable grounds to believe the person was driving a vehicle while under the influence.				◇		◇				◇										
The person was arrested and charged with driving a vehicle while under the influence.	◇		◇	◇					◇			◇				◇				◇
A chemical test was conducted under the implied consent law.						◇				◇	◇					◇	◇		◇	
The test results indicate alcohol concentration exceeding the legal standard.						◇				◇	◇	◇	◇			◇	◇		◇	
The officer served a notice of suspension or revocation upon the person.		◇					◇								◇			◇		
13. The officer's report to the state driver licensing agency must include –					NA LS			NA LS			NA LS			NA LS						
A statement of all information relevant to the enforcement action.	◇	◇	◇						◇			◇								
A statement that the officer had reasonable grounds to believe the person was driving while under the influence.				◇			◇			◇			◇		◇	◇	◇		◇	
A statement describing the officer's grounds for belief that the person was driving while under the influence.	◇	◇	◇			◇			◇			◇						◇		
A statement that the person was arrested and charged with driving while under the influence.				◇		◇									◇	◇	◇			◇
A statement that a chemical test was administered under the implied consent law.						◇	◇			◇					◇				◇	
A statement that chemical test results indicate alcohol concentration exceeding the legal standard.		◇				◇	◇			◇					◇		◇		◇	
A statement that any chemical tests were administered according to the requirements of state law.																	◇		◇	
A written report of the chemical test results from the agency which performed the test.	◇		◇						◇			◇	◇			◇		◇		◇
A copy of the suspension or revocation notice served on the person, or a statement that the notice was served.	◇	◇											◇				◇			
A copy of the temporary permit issued to the person, or a statement that such a permit was issued.	◇											◇	◇			◇				
Information which identifies the person.	◇		◇						◇			◇								◇

LS – see the Law Summary for more information NA – the law does not specify this information, or the question is not applicable.

Comparison of Model Revocation on Administrative Determination Law and Comparable State Laws

	ROAD	AK	CO	DE	DC	IN	IA	LA	ME	MN	MS	MO	NV	NC	ND	OK	OR	UT	WA	WV
13. Continued																				
A copy of the criminal complaint.	◇		◇						◇			◇						◇		
Any license surrendered by the person.	◇	◇	◇	◇		◇	◇			◇	◇	◇	◇		◇	◇	◇	◇	◇	
See the Law Summary for additional items.		◇				◇						◇	◇				◇			
14. Within how much time after the arrest must the officer's report be submitted?		NA	NA	NA	NA	NA		NA		NA	NA			NA						
The report must be submitted "immediately."	◇						◇		◇				◇						◇	
The report must be submitted within the time indicated (h = hours; d = days).															5d	72h		5d		48h
The time is to be specified in regulations of the department.												◇					◇			
15. The law specifies that the officer's report to the driver licensing agency must be —					NA			NA						NA						LS
A "sworn" report.	◇	◇				◇			◇		◇				◇	◇	◇	◇	◇	
A "verified" report.			◇									◇								
A "certified" report.				◇			◇			◇			◇							◇
16. Is an opportunity for a hearing provided prior to the effective date of the suspension or revocation?	no	yes	yes	yes	yes	no	no	yes	yes	LS	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
17. Within how many days following receipt of the suspension or revocation notice must a hearing be requested?	NA	7	7	15	5	NA	10	10	10	LS	30	15	LS	NA	5	15	10	10	7	10
18. Within what period of time must the hearing be held?		NA			NA	NA		LS	NA	LS	NA LS	NA	LS	LS		NA				
Within the specified number of days from the date of receipt of the notice.	30		60	30			20						15	3-5	20					20
Within the specified number of days from the date of the arrest.								45									30	30	45	
19. Is the hearing administrative or judicial?	adm.	adm.	adm.	adm.	adm.	jud.	adm.	adm.	adm.	LS	jud.	LS	adm.	jud.	adm.	adm.	adm.	adm.	adm.	adm.
20. The law specifies that the following issues are within the scope of the hearing:																				
Whether the officer had reasonable grounds to believe the person was driving a vehicle while under the influence.		◇		◇			◇	◇	◇	◇				◇	◇	◇	◇	◇	◇	◇
Whether the person was arrested and charged with driving a vehicle while under the influence.								◇						◇	◇	◇	◇		◇	◇
Whether a chemical test was conducted under the implied consent law.		◇						◇		◇				◇					◇	
Whether the test results indicate alcohol concentration exceeding the legal standard.		◇					◇	◇		◇			◇	◇	◇	◇	◇	◇	◇	
Whether chemical tests were administered according to the requirements of state law.										◇				◇	◇	◇	◇		◇	◇
Whether the person was in fact driving while under the influence.				◇																◇
Whether the person was in fact driving while having a blood alcohol concentration exceeding the legal standard.	◇		◇										◇							◇
Whether there are sufficient grounds to support the proposed suspension or revocation.				◇			◇													

LS — see the Law Summary for more information NA — the law does not specify this information, or the question is not applicable

Comparison of Model Revocation on Administrative Determination Law and Comparable State Laws

	ROAD	AK	CO	DE	DC	IN	IA	LA	ME	MN	MS	MO	NV	NC	ND	OK	OR	UT	WA	WV
20. Continued																				
Whether the officer informed the person of his rights and of the consequences of taking or refusing the test.								◇		◇						◇	◇			
See the Law Summary for additional issues.						◇	◇				◇					◇	◇			
21. The law specifies that the standard of proof at the hearing is the "preponderance of the evidence."	◇	◇	◇	◇					◇	◇		◇		◇	◇					◇
22. The law specifies that a record of the hearing must be made.	◇		◇		◇		◇	◇		◇					◇	◇	◇	◇		
23. Where is the hearing usually held?				NA	NA				NA											
In the county where the arrest occurred.							◇			◇	◇	◇		◇		◇	◇	◇	◇	◇
In the county where the person resides.								◇					◇							
Other – See the Law Summary.	◇	◇	◇			◇									◇					
24. Are any presumptions applicable to the hearing created on the basis of chemical test results?																		LS		
Test results showing BAC exceeding the legal standard create a prima facie presumption the person was under the influence.					◇															
Test results showing BAC exceeding the legal standard create a conclusive presumption the person was under the influence.				◇																
No presumption applicable to the hearing is created (although presumptions applicable to the criminal prosecution may be created).	◇	◇	◇			◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇	◇		◇	◇
25. Following the hearing, is judicial review of an adverse decision available?	yes	yes	yes	yes	yes	LS	yes	yes	yes	yes	NA	LS	yes	no	yes	NA	yes	yes	yes	yes
26. Does a petition for judicial review stay the suspension or revocation?					NA	NA	NA			NA	NA	LS		NA		NA		NA		
No, the license action is not stayed.				◇				◇							◇		◇			
No, a stay is not automatic, but the court may grant a stay on specified grounds.	◇	◇	◇						◇				◇						◇	◇
27. Is the officer who administers a chemical test required to warn the person of the consequences of a BAC which exceeds the legal standard?	no	no	no	no	no	no	yes	yes	no	yes	no	no	no	yes	no	yes	yes	yes	yes	no
28. Is a person who refuses to submit to a test subject to the same procedures for license suspension or revocation as the person whose BAC exceeds the legal standard?		yes	yes	yes	no	yes	yes	yes	no	yes	yes	no	yes	yes	yes	yes	yes	no	yes	no
29. The level of alcohol concentration at which driving a vehicle is unlawful in this state (illegal per se) is –		0.10	0.15	0.10	0.10	0.10	0.13	0.10	0.10	0.10	0.10	0.10	0.10	0.10	0.10	0.10	0.08	0.08	0.10	NA
30. The level of alcohol concentration at which a person driving a vehicle is subject to license action (administrative per se) is –	0.10	0.10	0.15	NA	NA	0.10	0.10	0.10	0.10	0.10	0.10	0.13	0.10	0.10	0.10	0.10	0.08	0.08	0.10	0.10

LS – see the Law Summary for information NA – the law does not specify this information, or the question is not applicable

Court Challenges to Administrative Suspension/Revocation

To date, cases related to administrative suspensions have been taken before and decided by four State Supreme Courts.

The first of these was in Delaware and was argued on the manner in which the law had been adopted. The State legislature had passed the law, but prior to signing it the Governor found it necessary to "line veto" a portion of it related to the fiscal impact. When this was found improper by the State Supreme Court the legislature promptly passed and the Governor signed a new law that overcame the previous objections.

The second challenge was in Minnesota (*Heddan v. Dirkswager*, 336 N.W. 2d 54, Minn. 1983). The Supreme Court of that State not only approved the concept but also approved the "administrative review" process that has been so effective in reducing the number of hearing requests.

Next, a challenge was filed in Indiana to contest the adverse findings of the Porter County Superior Court (*Ruge and Packard v. Kovach, Ferguson, Paul and Dowell*; 1984). The Indiana Supreme Court reversed the trial court and decided:

> "... we find that this most compelling interest in highway safety and public welfare justifies the State in making summary suspensions pending the outcome of the prompt post-suspension judicial hearing available by statute."

Finally, the Supreme Court of Missouri heard an appeal from the Circuit Court of Jackson County (*Collins v. Director of Revenue, and Johnson v. Director of Revenue*; May, 1985). The Missouri Supreme Court upheld the State procedures and also clarified that, in Missouri, it is not required that the arresting officer testify at administrative hearings. The Court said, in addressing the defendant's right to confrontation, that information submitted on the record was adequate to uphold the administrative license suspension and if the defendant had wanted the officer to appear it should have been requested prior to the hearing. In explanation, the Court said:

> "If a prima facie case is presented through the records in the Department case file, the Department should not be required to present witnesses at the administrative hearing. This is because the Missouri Administrative Procedure Act, in particular, paragraph 536.070(2), RSMo 1978, provides each party with the opportunity to call and examine witnesses, to introduce exhibits and "to impeach any witness regardless which party first called him to testify." Further, any aggrieved person in a contested case has a right to subpoena any witness to appear at the administrative hearing. Section 536.077, RSMo 1978.
>
> If appellant Johnson desired to confront the arresting officer, she needed only to request that the officer appear at the hearing. The existence of this unbridled subpoena right undercuts any argument that the administrative hearing procedure was unfair. Finally, the United States Supreme Court has acknowledged that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Dixon v. Love*, 431 U.S. 105-113 (1977) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)). We find that the procedures provided appellant Johnson were constitutionally sufficient and that she was not denied her rights of confrontation and cross-examination."

Other States have suggested various means of alleviating the problem of officer appearance at hearings, perhaps one of the most successful being the use of telephoned testimony in Iowa. In that State administrative driver licensing hearings are scheduled to coincide with the duty hours (or off duty hours) of the arresting officers so that, for example, if the officer goes off duty at 8:00 a.m. the hearing may be scheduled for 8:30 and his testimony is accepted at that time by telephone. This results in a significant reduction in the cost of police overtime.

On the other hand, the Minnesota approach was to resolve several issues at once by providing an

interim level of due process. This procedure, called "administrative review," dispenses with all direct testimony including that of the arresting officer and resulted in an immediate reduction in the number of hearings requested.*

When the 1982 legislature acted to strengthen the Minnesota administrative revocation law it was concerned to see that drivers who refused or failed a chemical test were quickly ruled off the road and were not able to delay that driver license revocation through a series of appeal or review procedures.

In recommending the 1982 amendments, Minnesota Attorney General Warren Spannaus advised the Legislature that if there were provisions for prompt review which would afford due process, the revocation itself need not be stayed pending such a review. This opinion was based on a number of appellate court decisions, including the U.S. Supreme Court decision in *Mackey v. Montrym*, which relied on balancing the public interest in promptly removing unsafe drivers from the road against the private interest in retaining the driving privilege. The availability of prompt *post*-revocation review is, however, an important part of assuring that administrative license revocation can withstand constitutional challenge.

To maintain this protection of the private interest in the driving privilege, Minnesota's 1982 amendments to Sec. 169.123 provided two kinds of review and made either or both available.

The Minnesota Supreme Court in unanimously upholding the 1982 law (*Heddan vs. Dirkswager*) described the review process as follows:

"During the 1982 legislative session Minn. Stat. § 169.123 was amended in order to reduce the time lapse between an implied consent violation and the imposition of license revocation. The old law delayed all revocations for 30 days from the notice of revocation. The new law provides just 7 days. Minn. Stat § 169.123, subds. 5 and 5a (1982). The old law enabled additional delay by a request for judicial review. The new amendments provide that '[t]he filing of the petition shall not stay the revocation or denial.' Minn. Stat. § 169.123, subd. 5c (1982).

"While removing the opportunity for lengthy delay, the 1982 amendments simultaneously created a more efficient system for obtaining review of the revocation order. The amendments provided for two distinct avenues of review: administrative review by the Department of Public Safety, and judicial review in a county or municipal court.

"The administrative review mechanism is entirely new. The statute provides as follows:

Administrative review. At any time during a period of revocation imposed under this section a person may request in writing a review of the order of revocation by the commissioner of public safety. Upon receiving a request the commissioner or his designee shall review the order, the evidence upon which the order was based, and any other material information brought to the attention of the commissioner, and determine whether sufficient cause exists to sustain the order. Within 15 days of receiving the request the commissioner shall report in writing the results of his review. The review provided in this subdivision is not subject to the contested case provisions of the administrative procedure act in sections 14.01 to 14.70.

The availability of administrative review for an order of revocation shall have no effect upon the availability of judicial review under this section.

Minn. Stat. § 169.123, subd. 5b (1982). This provision contemplates an informal review procedure which is designed to remedy obvious errors. The procedure is speedy, promising a result within 15 days, and it accords a certain measure of due process to subjects of revocation orders.

"Drivers requesting administrative review are asked to fill out an administrative review form setting forth facts pertaining to why the revocation is not valid. Drivers are then asked to sign the form, have it notarized, and submit it to the commissioner. Each numbered paragraph of the form sets forth an element of the implied consent violation and solicits the driver's version of the facts pertaining to that element.

"Administrative reviews are conducted by civil service employees known as 'driver safety analysts.' All employees in this classification have past experience with the laws and rules governing license revocation. They have also undergone training in administrative review and in the legal principles in this area.

* The following description of the Minnesota process is excerpted from "Minnesota's Double-Barrelled Implied Consent Law," by Forst Lowery.

"In addition to the written request for review, drivers may appear in person for administrative review on any business day in St. Paul or at regularly scheduled times in locations throughout the state. Counsel may appear with the driver, although there are not provisions for subpoenaing or cross-examining witnesses.

"In conducting an administrative review, the review officer considers information provided by the driver and all relevant reports provided by law enforcement agencies. The review officer reports his findings to the driver within *15 days* of request for review. The report includes findings on each element of the offense. Within 30 days following receipt of the notice and order of revocation a person may petition the court for judicial review. Minn. Stat. § 169.123, subd. 5c (1982). This may be done while pursuing administrative review.

"The judicial review provision, as amended in 1982, requires that a hearing be conducted 'at the earliest practicable date,' and in no event later than 60 days after the filing of a petition for judicial review. Minn. Stat. § 169.123, subd. 6 (1982). Judicial district administrators are directed to implement this requirement through efficient scheduling and the transfer of cases within their districts to expedite hearings. Court administrators in the 10 Minnesota judicial districts have established a scheduling system for implied consent cases whereby judicial review will normally be had from within 10 to 40 days following the filing of a petition." (End of quotation from *Heddan vs. Dirkswager*.)

Summary Suspension of Driver Licenses Of Drunken Driers—Constitutional Dimensions*

John H. Reese, Professor of Law
University of Denver

Increasingly, public concern has turned toward the problem of drunk driving. Every year, over half of the fatalities occurring on our nation's highways involve persons who are operating motor vehicles while under the influence of alcohol. In response to this concern numerous state legislatures have begun to pass stricter laws to deal with the problem. While the approaches taken by the various states have varied considerably, at the forefront of this movement are statutes which allow a state to suspend summarily a person's driver's license upon the establishment, usually before an administrative officer, of probable cause to believe that the person was operating a motor vehicle while under the influence of alcohol.

These statutes generally are of two types: those that allow suspension without a pre-termination hearing upon the establishment of both probable cause for arrest and the refusal by the driver to submit to an alcohol test, and those which will allow termination upon the certification by the arresting officer that the driver was operating a motor vehicle while under the influence.

An example of the first type of statute is that which was recently enacted in the State of Minnesota. Under Minn. Stat. Sec. 162.123, the Commissioner of Public Safety may summarily suspend an individual's driver's license for a period of 90 days upon certification by an arresting officer (1) that there was probable cause for the officer to believe that the driver was operating his motor vehicle while under the influence of alcohol and (2) that the driver refused to submit to a chemical testing procedure to determine the actual alcohol content in his blood.** Although Minnesota does not provide for a hearing prior to suspension, the driver may request an administrative review of his suspension which must be provided within 15 days following his request. If not satisfied with this administrative review, the driver may then request a judicial hearing.

An example of the second type is W. Va. Code Sec. 17C–5A–2, which allows the summary administrative suspension of a driver's license merely upon the certification by the arresting officer that the driver was operating a motor vehicle while under the influence of alcohol. Much like Minnesota, West Virginia will provide the driver with a post-termination hearing if the driver so requests.

Regardless of which procedure is followed, such summary administrative suspensions of an individual's driver's license raise important questions regarding the provisions of procedural due process. The United States Supreme Court has recognized the fact that once a driver's license has been granted to an individual he acquires a property interest in that license.

Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important rights of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. *Bell* v. *Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L.Ed. 2d 90 (1971).

Since a person clearly has a property interest in the continued possession of a driver's license, it therefore must be determined whether summary suspension procedures such as those utilized in Minnesota and West Virginia meet the requirements of procedural due process.

Traditional Areas in Which Summary Suspension has been Allowed

The U.S. Supreme Court traditionally has recognized certain areas in which property may be

*Presented before the 14th annual Institute on Motor Vehicle and Traffic Law.

** At least 13 states allow immediate summary suspension of a driver's license for refusal to submit to alcohol level testing. These include Alabama, Alaska, Delaware, Iowa, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Rhode Island, New Hampshire, and New Mexico.

seized summarily without affording the owner a pre-termination hearing. These areas have included:

Protection of national security during wartime.

Protection of the federal government's revenues.

Protecting the public against economic injury, such as collapse or mismanagement of banking institutions.

Protecting the public health from unsafe food and drugs.*

The concept of summary state action arises from two distinct sources. The first of these is the nineteenth-century concept of broad police powers whereby the state is capable of exercising its authority to protect the public health and welfare from either actual or perceived threats to its well-being. Freedman at 3. The second source is the tort law concept that an individual is entitled to use self-help without resorting to legal procedure in order to abate a nuisance. *North American Cold Storage* v. *City of Chicago,* 211 U.S. 306, 29 S. Ct. 101, 53 L.Ed. 195 (1908).

North American Cold Storage, one of the first cases recognizing the government's power to confiscate property summarily in order to preserve the public health and safety. The case involved the attempted seizure by Chicago authorities of spoiled poultry under the provisions of a municipal ordinance authorizing such a seizure. The owner of the processing plant in which the chickens were held refused to allow the Chicago authorities into the plant, and in response they would not allow the owner to further conduct business. The Supreme Court upheld the action of the Chicago authorities, recognizing that the legislature has broad power to protect the health and safety of its citizenry and can determine that because of practical considerations and the perceived threat to public health that a pre-termination hearing is not necessary. "The right to so seize is based upon the right and the duty of the state to protect and guard, as far as possible, the laws and health of its inhabitants." *North American Cold Storage,* 211 U.S. at 315.

A case similar to *North American Cold Storage*, also involving food products, is *John Quincy Adams* v. *City of Milwaukee*, 228 U.S. 572, 33 S.Ct. 610 (1913). In *Adams*, a dairy farmer who lived outside the City of Milwaukee sought to enjoin enforcement of a Milwaukee ordinance which allowed summary seizure of mislabeled milk which was attempted to be shipped into the city. The Court upheld the Milwaukee ordinance, recognizing the broad scope of the police power available to protect public health and the fact that confiscation was the only manner in which the city could efficiently prevent the unwholesome milk from being introduced into the market.

Both *Adams* and *North American Cold Storage* recognized that practical considerations could allow the state to take summary action against the individual where, as was the case in *North American*, provision of a pre-seizure hearing would have, at worst, permitted the poultry onto the market during the pre-seizure stage and would have, at best, necessitated the fiscal and administrative burdens of guarding or impounding the meat before and during the hearing. In both cases the Court felt that requiring pre-termination hearings would have defeated the government's substantial interest in preserving public health.

Two later cases recognize that the concept of summary action may be expanded beyond the area of public health and safety. In *Fahey* v. *Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), the Court recognized that the area of permissible summary action includes the take-over and regulation of a savings and loan institution. "The delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner." *Fahey* v. *Mallonee*, 332 U.S. at 253.

The *Fahey* Court's determination turned largely on practical considerations and historical precedent. It recognized that in order to maintain public confidence in both the specific institution involved and in the banking system as a whole it was necessary for the government to be empowered to take prompt action in order to remedy the apparent mismanagement of the bank. Further, the banking industry had been traditionally subjected to pervasive regulation.

In *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950), the Court allowed the expansion of the summary action concept into the area of mislabeled drugs. The case involved the summary seizure of a misleadingly labeled food supplement (Nutrilite) which was neither dangerous nor harmful to the public health. The Court's decision was based on two considerations. The first was that the legislature has the power to determine those concerns which are serious enough to enable the government to act summarily, and the second was the application of a simple balancing test—striking a balance between the public good served by the seizure and the private harm which would result:

* Freedman, "Summary Action by Administrative Agencies, 40 *U. of Chi. L.R.* 1 (1972).

Congress weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary interference with its distribution and decided in favor of the speedy, preventative device of multiple seizures. We would impair or destroy the effectiveness of that device if we sanctioned the interference which a grant of jurisdiction to the District Court would entail. *Ewing*, 339 U.S. at 601–602.

Summary action has also been allowed in the areas of securities regulation and government-related, private employment. In *R. A. Holman & Co.* v. *Securities & Exchange Commission*, 229 F.2d 127 (D.C. Cir. 1962) a broker sued the S.E.C. to have declared invalid a Commission order rescinding the petitioner's exemption from a registration requirement for a specific stock issue. The Court held that the summary rescission of petitioner's exemption was constitutional. "In a wide variety of situations, it has long been recognized that where the harm to the public is threatened, and a private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *R. A. Holman & Co.*, 229 F.2d at 131.

In Cafeteria & Restaurant Workers Union, Local 473 v. *McElroy*, 367 U.S. 886, 81 S.C. 1743, 6 L.Ed 2d 1230 (1961) the Supreme Court allowed the summary suspension of a security clearance granted to a civilian employee working at a secured naval installation. In determining whether or not a pretermination hearing should have been afforded the civilian employee, the Court again applied a simple balancing test similar to that used in *Ewing*. ". . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union*, 367 U.S. at 895.

The Court also recognized that due process is not a fixed standard to be applied to all cases but rather is dependent upon a balancing of both the nature of the private interests and of the public interests involved. "The Fifth Amendment does not require a trial type hearing in every conceivable case of government impairment of private interest. . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union*, 367 U.S. at 894–95.

The cases referred to in this section have generally been classified as emergency doctrine cases. However, *Ewing* v. *Mytinger & Casselberry, Fahey* v. *Mallonee*, and *Cafeteria & Restaurant Workers Union* v. *McElroy* amply demonstrate that the so-called emergency doctrine is often applied in situations which do not necessarily involve emergency conditions. Rather, the Court seems generally to apply a balancing test in which the importance of the governmental interest is set off against the degree of private harm which will result from the summary deprivation of property. Included in this calculus are numerous factors: (1) the degree to which the governmental objective will be defeated by the providing of a prior hearing, (2) practical considerations including administrative and fiscal burdens, and (3) the degree to which the private interest will be harmed as a result of the summary seizure of the property.

In addition, when upholding summary action, the Court has recognized that the injured person will have a private tort action against any public officers who abuse their authority. *North American Cold Storage* v. *City of Chicago*, 211 U.S. 306, 316.

The *Mathews v. Eldridge* Standard for Due Process

More recent cases have further refined the balancing test which the Court will apply in order to determine whether or not a hearing is necessary prior to the deprivation of a property interest. The test which the Court has relied upon most recently is that which was set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976).

Although the test originally applied in *Mathews* was used to determine what type of hearing was necessary prior to the deprivation of a property interest, later cases have used the same test in order to determine whether any hearing is needed before the government may act. The test is expressed in the following language from *Mathews:*

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest, including the function involved and the fiscal or administrative burdens that the additional procedures would entail. *Mathews*, 424 U.S. at 334–35.

Implicit in the *Mathews* analysis is the consideration of two additional factors. The first of these,

related to the nature of the private interest affected, is the degree of deprivation which the private party will suffer. The Court has indicated that the severity of deprivation can be determined by examining two factors: the degree to which the private parties may be compensated for their loss of property and how long they will be deprived of their property until some type of a post-deprivation hearing is afforded. *Mackey* v. *Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed 2d 321 (1978). Secondly, when considering the nature of the government's interest, it is also proper to consider whether or not that interest would be defeated or severely limited by the time delay which is inherent in the provision of a hearing.

The Government's Interest in Maintaining Highways

Applying the *Mathews* analysis to the situation whereby a driver's license is suspended summarily when a driver is arrested for drunk driving suggests that the Supreme Court would allow such action. The Supreme Court has several times recognized that the maintenance of highway safety and the prevention of automobile accidents are an important State interest. "Far more substantial than the administrative burden is the important public interest in safety on the roads and highways, and the prompt removal of the safety hazard." *Dixon* v. *Love*, 431 U.S. 105, 114, 97 S.Ct. 1723, 52 L.Ed. 2d 172 (1977). More recent cases have directly analogized the suspension of a driver's license upon refusal to take alcohol blood-level tests to the situations which were present in *North American Cold Storage* and *Ewing*. "We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled food stuffs." *Mackey* v. *Montrym*, 443 U.S. at 17 (1978).

The Nature of the Private Harm as a Result of Summary Suspension

In order to apply the *Mathews* v. *Eldridge* analysis to driver's license suspensions, the nature of the private interest must also be examined. The Court has recognized that while the property interest which a driver holds in his driver's license is important, it is not of the same magnitude as are other interests, i.e., disability payments. "Unlike the Social Security recipients in *Eldridge*, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence." *Dixon* v. *Love*, 431, U.S. at 113.

The degree to which a driver may suffer such irrevocable harm will depend, to a large extent, upon the length of time the driver is without a license prior to the hearing. "The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey* v. *Montrym*, 433 U.S. at 12 (1978). Therefore, in order for a summary suspension to comply with the *Mathews* v. *Eldridge* due process standard, the State should provide some type of post-suspension hearing almost immediately. This approach has been followed in virtually all States which allow such summary suspensions.

The Risk of Error Inherent in Summary Procedures

Finally, the third part of the *Mathews* analysis must be applied to determine the likelihood of an erroneous deprivation as a result of summary driver's license suspensions and whether an alternative method would suffice. The current Court seems to believe that the risk of such an erroneous deprivation is small in relation to the important governmental interest which is served by removing a drunk driver from the highways.

In *Mackey* v. *Montrym*, 443 U.S. 1, even the existence of a factual dispute as to whether the defendant had refused a breathalyzer test did not shake the Court's confidence in the initial report of an arresting officer. ". . . [w]hen disputes as to historical facts do arise, we are not persuaded that the risk of error inherent in the statute's initial reliance on the representation of the reporting officer is so substantial in itself as to require that the Commonwealth stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence." *Mackey* v. *Montrym*, 443 U.S. at 15.

The *Mackey v. Montrym* Decision

The Court's current attitude toward the summary suspension issue can best be understood by a careful reading of *Mackey* v. *Montrym*, 443 U.S. 1 (1978), discussed earlier. *Mackey* involved the summary suspension of an individual's driver's license for refusing to submit to an alcohol breath-analysis test following his arrest for driving under the influence. In accordance with the relevant

Massachusetts statutory provision, the arresting officer certified to the registrar of motor vehicles that he had probable cause to believe that Montrym has been operating his automobile while under the influence of alcohol and that Montrym had refused to take a breathalyzer test. The registrar then summarily suspended Montrym's license.

Chief Justice Burger, writing for the majority, upheld the constitutionality of the Massachusetts law, holding it to be a valid exercise of legislative authority in advance of the cause of highway safety. In his opinion, the Chief Justice applied the three-step analysis used in *Mathews* v. *Eldridge* in coming to his conclusion. This included an examination of: (1) the nature of the private interest being abrogated by governmental action; (2) the possibility that the summary suspension of Montrym's driver's license would result in an erroneous deprivation; and (3) the importance of the governmental interest being advanced by the use of summary procedures.

In addition to ruling favorably for the state on all three parts of the *Mathews* analysis, the majority was unable to distinguish *Mackey* from *Dixon* v. *Love*, 431 U.S. 105 (1977), an earlier case which involved the summary administrative revocation of a driver's license. In *Dixon*, the Court upheld summary suspension and distinguished it from the earlier driver's license suspension case of *Bell* v. *Burson*, 402 U.S. 535 (1971) which concerned the constitutionality of a Georgia statute mandating the suspension of a driver's license when its holder was involved in an accident but failed to post a sufficient bond to cover any potential civil liability for damages. Unlike *Bell*, both *Dixon* and *Mackey* concern a matter about which the State has a great deal of concern; namely, highway safety.* This factor fully distinguishes *Bell* v. *Burson*, where the only purpose of the Georgia statute there under consideration was "to obtain security from which to pay any judgments against the licensee resulting from the accident," *Bell* v. *Burson*, 402 U.S. at 540. *Dixon* and *Mackey*, however, both ". . . involve the constitutionality of a statutory scheme for administrative suspension of a driver's license for statutorily defined cause without a pre-suspension hearing. In each, the sole question presented is the appropriate timing of the legal process due a licensee. And, in both cases, that question must be determined by reference to the factors set forth in *Eldridge*." *Mackey* v. *Montrym*, 443 U.S. at 11.

In *Mackey*, a 5–4 decision in which Stewart, Brennan, Marshall, and Stevens dissented, much of the majority's support for the Massachusetts statute was based on the fact that under the Massachusetts law a driver whose license was suspended was provided with an immediate post-suspension hearing before the registrar if he so desired. In the majority's judgment, this provision of the statute was relevant to two factors of the *Mathews* analysis. First, by minimizing the amount of time during which Montrym could be wrongfully deprived of his license, the Court felt that the first factor of the *Mathews* analysis, the degree of private harm suffered as a result of the summary action, would be minimized. Second, the majority also felt that providing a prompt post-suspension hearing would minimize the charge that a license would be suspended erroneously, the second factor of the *Mathews* analysis.

While the *Mackey* Court felt that providing a prompt post-suspension hearing was a major factor in allowing the Massachusetts statute to stand, it did not feel that the fact that the suspension was predicated wholly upon the report of the arresting officer was a threat to the statute's constitutionality. Rather, the Court seemed to feel that the arresting police officer would be in a better position to determine if the driver had been violating the drunk-driving laws than would the registrar. "The officer whose report triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the pre-suspension process." *Mackey* v. *Montrym*, 443 U.S. at 14. Also see *Barry* v. *Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed. 2d 365. Furthermore, as discussed earlier, any abuse of discretion by the police in regard to the pre-suspension process would expose the officer to personal liability for any harm suffered by the licensee. See *supra*, at 10. This, the Court felt, was a sufficient safeguard to minimize the risk that a license would be suspended erroneously.

Balanced against what the *Mackey* Court saw as a minimal deprivation of property and a low risk of error is the strong governmental interest in highway safety. See *supra* at 11. While much of the dissenting opinion in *Mackey* focused on the fact that the Massachusetts statute was merely a penalty for failure to cooperate with the police, the majority opinion firmly acknowledged the statute's relation to the "paramount interest the Commonwealth has in preserving the safety of its public highways . . . ." *Mackey* v. *Montrym*, 443

* See *Chrisner* v. *Complete Auto Transit*, 645 F.2d 1251 (6th Cir. 1981) where a civil rights action was defeated because the company's hiring procedures, while in effect discriminatory, were related to the goal of maintaining safe highways.

U.S. at 17. The result in *Mackey* was that the Court upheld the summary suspension of Montrym driver's license despite the lack of a pre-suspension hearing.

While the four *Mackey* dissenters have by now probably been pared to three with the departure of Justice Stewart, they did bring out two points which may be useful in attempting to draft a statute allowing summary suspension. The first of these is the penal appearance of the Massachusetts law. While those who refuse the Massachusetts breathalyzer test will suffer the suspension of their driver's licenses, those who take the test and fail will not be exposed to the same fate unless a conviction is obtained. Such a conflicting approach weakens any argument that the purpose of the law is to remove drunk drivers from the highways. Secondly, the dissenters denigrated the value of the post-suspension hearing provided in *Mackey*. Instead of considering the merits of the suspension, the registrar was statutorily limited to a consideration of whether the officer's report contained sufficient data upon which to base a suspension (i.e., probable cause and refusal) and to an examination of the report for clerical errors. Such a narrowly limited review was not thought to be sufficient since the registrar has essentially no power to prevent suspension when provided with a report which meets the statutory requirements. In addition, under the Massachusetts approach, the licensee was not informed of his right to a post-suspension hearing. Such a failure, in the dissenters' opinion, further prejudiced the licensee and was another factor in their conclusion that the Massachusetts statute had denied Montrym procedural due process.

The import of the *Mackey* decision is that the current Court is willing to allow the use of summary proceedings for the suspension of a driver's license upon arrest for drunk driving. Furthermore, if a state were to provide a prompt (probably within 10 days) post-suspension hearing at which the substantive issues could be considered by an officer with discretion to overturn the suspension, even the dissenters in *Mackey* may be persuaded to support summary action.

The Burger Court's receptiveness to the interests served by a summary suspension has also been indicated in several more recent cases involving similar actions. In *Barry* v. *Barchi*, 443 U.S. 55 (1979) the Court upheld the summary suspension of a horse trainer's license upon a showing that one of his animals had raced while some illegal drugs were in its blood. In *Barry*, the Court recognized that the harm to the individual trainer as a result of the summary action could be severe. However, they also indicated that the state had a strong interest in maintaining the integrity of the racing system and that initial reliance upon the report of an expert who administered the blood test to the horse was acceptable. Summary action was therefore appropriate. However, *Barry* emphasizes that even under the Burger Court, a prompt post-suspension hearing must be afforded the licensee in order to validate the summary action. The need for a prompt post-suspension hearing has also been emphasized in *Ciechon* v. *City of Chicago*, 634 F.2d 1055 (7th Cir. 1980) in which the summary suspension of firefighters following an internal investigation was upheld. There, the Court, citing *Barry* v. *Barchi*, emphasized that summary action was permissible only if the employees were provided with a prompt later hearing.

The Model for Analysis

In summary, the U.S. Supreme Court has declared the relevant analysis to apply to summary suspension of driver licenses to be that of *Mathews* v. *Eldridge*. It so stated in *Dixon* v. *Love* and *Mackey* v. *Montrym*. Although it did not state specifically that the appropriate analysis was that of *Mathews* v. *Eldridge*, in *Barry* v. *Barchi* the U.S. Supreme Court approached the question of summary suspension of a horse trainer's license in a similar fashion.

Therefore, the current attitude of the Court toward summary suspension of licenses is *Mathews* as amplified by principles extracted primarily from four other cases. They are: *Bell* v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971); *Dixon* v. *Love*, 431 U.S. 105, 97 S.Ct. 1723 (1977); *Mackey* v. *Montrym*, 443 U.S. 1, 99 S.Ct. 2612 (1979); and *Barry* v. *Barchi*, 443 U.S. 55, 99 S.Ct. 2642 (1979). By relating the principles of these cases to the three factors of analysis set forth in *Mathews*, we may synthesize and describe the manner in which the *Mathews* factors may be expected to be applied in summary suspension of a driver's license upon arrest for driving while under the influence.

Mathews Factor No. 1: "The private interest that will be affected by the official action."

First, all four Supreme Court cases agree that a driver's license is an entitlement which may be taken away by the State only by procedures which meet 14th Amendment standards of due process of law. Beginning with the premise that due process principles apply, the initial evaluation concerns the degree of the deprivation of a private interest. That is, to what extent may the private party be compensated for loss of the interest and how long will

the party be deprived of that interest until some sort of post-deprivation hearing and resolution is provided. *Mackey.* Where a driver's license has been suspended, there is no way in which the private party may be fully compensated for its loss during the period of the suspension. Although there is a possibility of some sort of recovery in damages, the fact remains that the licensee cannot be made whole for the loss of use of the motor vehicle for the period of suspension. Similarly, where a horse trainer summarily loses his license, which is later restored, there is no way that the trainer can be adequately compensated for loss of the clients collected over the span of his career. *Barry* (concurring opinion). Conversely, where a party is erroneously deprived of disability benefits, the benefits wrongfully withheld may be paid after determination of the right to receive them.

Nevertheless, government may be in a position to minimize the degree of deprivation by providing for some type of restricted permit during the suspension period. *Dixon.* Similarly, the shorter the period of deprivation the stronger becomes the position of the State in taking summary action. The Supreme Court sustained a potential 90 days' loss of a driver's license for refusal to submit to a breath test when arrested for drunken driving in *Mackey.* In *Dixon* the Supreme Court upheld license revocation for an indefinite period where the driver's license had been suspended three times within a period of 10 years.

Distinct from the issue of the term of the license suspension is the question of the promptness of the State in affording a post-suspension hearing which could rectify any mistake in imposing the suspension. In *Mackey* the Court demonstrated its concern with the timing of the post-suspension hearing by interpreting the statute to provide for an immediate "walk-in" hearing. In *Dixon*, a delay of 20 days before hearing was possible, but the Court held the procedures to meet the requirements of due process of law.

Mathews Factor No. 2: "The risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."

Where the summary license suspension is based on official records (e.g., prior traffic offense convictions) the Court appears to assume that the basic facts are not in dispute, that any dispute has been resolved, or that any opportunity to dispute them has been waived. *Dixon.* Where the basic facts are disputed, the Court will address the question of whether the procedures followed in making an *ex parte* determination of the basic facts are sufficiently reliable to justify a delay in resolving issues of credibility and conflict in the evidence. *Mackey, Barry.* Where the State procedures require an affidavit of an arresting officer, endorsed by a third person, and endorsed by the police chief, the Court will conclude that the risk of error is insubstantial. *Mackey.* This is true because due process of law does not mandate "perfect, error-free determinations." *Mackey.* So long as the procedures are designed to provide a reasonably reliable basis for concluding the facts are as a responsible government official warrants them to be, the Court considers such procedures to be in accordance with due process of law. *Mackey, Barry.* Furthermore, the question of risk of error is to be controlled by the generality of cases and not by those cases which could be termed the "rare exceptions." *Mackey.* Thus, where the procedures indicate that the private interest is not being "baselessly compromised" the *ex parte* findings of fact will generally be accepted. *Barry.*

Mathews Factor No. 3: "The government's interest, including the function involved and the fiscal or administrative burdens that the additional procedures would entail."

Where it is mentioned, in all four cases the Justices of the U.S. Supreme Court are unanimous in agreeing that if a genuine emergency situation exists, the State may act summarily to suspend a license, provided post-suspension procedures meet due process standards. However, the Justices may not agree that, in fact, the situation presents a genuine emergency. Thus, in *Mackey*, the Court divided on this issue. The majority held that the State interest in removing drunken drivers from the highways was at least as justifiable as summarily seizing mislabeled drugs or destroying spoiled foodstuffs. (Citing *Ewing* and *North American.*) The dissenters contended that the purpose of the suspension for refusing to submit to a breath test was not based upon emergency but was in truth based upon failure to cooperate with the police. They made the point that if removing drunk drivers from the highways were a genuine concern of the State, it would also suspend the licenses of persons who submit to a breath test and where the results show that the licensee was driving in violation of the law. However, where the public interest can be shown to be that of promoting safety on the roads and highways and prompt removal of safety hazards there seems to be little disagreement among the Justices. It appears that virtually all of them would agree that such a State interest is indeed important, acute, and perhaps, compelling. *Dixon, Mackey.*

Another consideration in the *Mathews* analysis is whether the government interest would be defeated or severely limited by the time delay inherent in providing a pre-deprivation hearing. *Mackey.* The majority in *Mackey* believed the government interest would be defeated or limited if a pre-deprivation hearing were required since a high-risk driver would be free to continue driving during the pre-hearing interval. However, the dissenters believed that the government interest was not removing drunken drivers from the highways, but was, instead, punishing them for failure to cooperate with the police. Hence, the situation was such that no valid government interest would be demonstrably disserved by delay. *Mackey* (dissenting opinion). The dissenters in *Mackey* further stated that such *ex parte* deprivations are permitted by due process of law only when clearly necessitated by the exigencies of law enforcement. To them refusal to submit to a breath test was not such an exigency.

As further elaborated by the Court, in these four cases, the *Mathews* v. *Eldridge* analysis would appear to support the constitutionality of a State statute providing for the summary suspension of a driver's license upon being arrested for driving while under the influence. Such a statute should be designed as follows:

> The legislature should include in the statute a statement of purpose making clear that the government interest is that of protecting the safety of persons on the roads and highways by quickly removing persons who have shown themselves to be safety hazards by driving while under the influence.
>
> The statute should provide for the prompt submission of proper affidavits by the arresting officer and, perhaps, they should be verified by a third person in order to establish the reasonably reliable factual basis for summary suspension which the cases require.
>
> The licensee should be given immediate notice of the fact that his license will be suspended as a collateral consequence of his arrest for driving while under the influence and he should be given immediate notice of the fact that an opportunity for a prompt post-suspension hearing is available. The notice should give adequate information to the licensee as to how that hearing process is to be implemented if he chooses to contest the suspension.
>
> The statute should provide procedures for a "speedy," "early," "prompt," or "immediate" hearing opportunity in which the hearing officer has authority to resolve any basic factual dispute and to provide prompt relief to the licensee in the event of improper suspension.
>
> Finally, the hearing officer should be authorized to conduct a hearing, the scope of which is broad enough to permit consideration of all factors relating to the adequacy of the grounds for the arrest for driving while under the influence.

The Civil Sanction—Criminal Sanction Distinction

Finally, it should be understood that summary suspension of a driver's license for arrest for driving while under the influence is completely independent of any criminal prosecution for the offense alleged. That is, the disposition of the criminal charge has no bearing on the validity of the suspension. The law is well established that persons may be sanctioned both criminally and civilly for the same conduct, for double jeopardy does not apply to the civil sanction. Furthermore, because the two sanctioning processes are completely independent, if a drunk driving charge is dismissed or is plea bargained to a lesser offense, or if the trial results in an acquittal, the summary suspension remains valid. For example, persons convicted of felonies may, as a collateral consequence of the conviction, be denied veterans' employment preferences, veterans' benefits, the opportunity to be buried in a national cemetery, the right to vote (permitted by the Fourteenth Amendment) and similar civil sanctions.

In *Helvering* v. *Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L.Ed. 917 (1938), the Supreme Court determined the propriety of an attempt by the IRS to impose civil tax penalties on a taxpayer who has been acquitted of tax fraud. The Court stated:

> That acquittal on a criminal charge is not a bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceeding was based has long been settled. . .[w]here the objective of the subsequent (civil) action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy. . .Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause

prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." 303 U.S. at 397, 93 S.Ct. at 632.

Suspension of a driver's license upon arrest for drunken driving is remedial and not punitive. Its purpose is to remove a safety hazard from the highways.

Similarly, the U.S. Supreme Court has held that collateral estoppel does not bar the application of civil forfeiture penalties to a person who brings gem stones into the country illegally, but who is acquitted on criminal charges for lack of intent. *One Lot Emerald Cut Stones and One Ring* v. *U.S.*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed. 2d 438 (1972). The Court stated:

> Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may only have represented an "adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." 409 U.S. at 235, 93 S.Ct. at 492.

The latest U.S. Supreme Court case on this question is *United States* v. *Ward*, 448 U.S. 242, 100 S.Ct. 2636 (1980). It involved an action brought by the United States to collect a "civil penalty" imposed for discharge of oil from a retention pit into navigable waters. The Court held the statutory penalty to be civil and said it does not trigger the protections afforded a criminal defendant. It referred, with approval, to a list of factors relevant to determining whether a so-called civil penalty is "remedial" or "punitive" in character. The *Mendoza-Martinez* factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned....*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554; 372 U.S. at 169, 83 S.Ct. at 567-578.

In *Ward*, the Court indicated the *Mendoza-Martinez* list is neither exhaustive nor conclusive on the issue, but applied it to conclude that the statutory civil penalty was not punitive in nature. Only the clearest proof will suffice to show that such a civil penalty is punitive in either purpose or effect.

For further discussion of the concept and citations of other authorities, see Ch. 17, Sec. 14 "Restrictions Resulting from Arrest Without Conviction," in S. Rubin, *Law of Criminal Correction*, 713 (2d ed. 1973); "The Collateral Consequences of a Criminal Conviction," 23 *Vand. L. Rev.* 929 (1970).

Administrative Procedure Issues Involved in the Summary Suspension of Driver Licenses for Driving While Intoxicated*

John H. Reese, Professor of Law, University of Denver

INTRODUCTION

In a 1982 paper delivered at the 14th Annual Institute, I reviewed the constitutionality of the concept of summary suspension of driver licenses on the basis of reasonable belief that the licensee was driving while intoxicated. As I indicated in that paper, there seems to be little question that, under proper procedural safeguards, States may implement such a program of summary suspension on the basis of a series of relevant decisions of the United States Supreme Court. However, I also pointed out that, because of our Federal system, to conclude that the Federal constitution permits such summary action answers only one-half of the question. We should always be mindful of the fact that State courts, construing their State constitutions, might assert the initiative to impose higher standards than those imposed by the United States Supreme Court. Such higher standards, designed to protect the licensee to a greater extent, would be perfectly acceptable in our governmental scheme. Nevertheless, in most circumstances State courts tend to interpret their constitutions consistently with United States Supreme Court constructions of the Federal constitution. As a result, there is constitutional congruity in most areas involving individual rights.

It has been well established for many years in both Federal and State courts interpreting both Federal and State constitutions that if an adequate hearing opportunity is provided a licensee before his license is suspended or revoked, and, provided such hearing was fairly administered, there is no constitutional question as to the validity of an administrative license suspension or revocation.

On occasion there is confusion in analyses of the problem of dealing with the drunk driver because of the fact that in the United States we have adopted a two-track system for the treatment of the offense. Briefly, the first track concerns the filing of a criminal charge of driving while intoxicated by an officer who has observed the offense or who has obtained an actionable BAC level by means of chemical testing. The charge activates the criminal track of the system. Following charging there will be arraignment, possible plea bargaining, perhaps a disposition prior to trial, or a trial on the DWI charge, followed by a decision of the court, which is subject to appeal to a higher court. It is important to note that in most States the criminal prosecution track for the charge of DWI is completely independent of any action which may be taken by the State to sanction the driver civilly. The most common civil sanction (pursued independently as indicated) is to suspend or revoke the driver's license for a period of time independently of the outcome of the criminal charge of driving while intoxicated. In some instances, courts determine whether driver's licenses are to be suspended. But, the modern trend is to vest the authority to suspend and revoke licenses in an administrative official who acts independently of the court and on a variety of criteria of decision.

A common example of administrative suspension is the so-called "point system" which subjects licensees to suspension or revocation upon the accumulation of an actionable number of points for being convicted of a variety of traffic offenses. It is important to remember, however, that point system suspensions are only one of many bases on which motor vehicle administrators are authorized to suspend or revoke driver licenses. Another important basis for action by the motor vehicle ad-

*Delivered before the 15th Annual Institute on Motor Vehicle and Traffic Law.

ministrator, and of primary interest to us, is administrative revocation of a driver license on the basis of probable cause or reasonable belief that the licensee was driving while intoxicated. To repeat—in many States this revocation authority is totally independent of any criminal charge for DWI. Later I shall consider the question of whether adminstrative revocation is barred because of dismissal or aquittal of criminal DWI charges. For the moment, I should like to focus on the general rule, which is to the effect that this administrative action is totally independent of whatever may occur in a criminal court.

It is suggested that a DWI incident implicates three diferent types of State statutes. It will be our purpose to attempt to demonstrate where there are and where there are not relationships between these three statutes in order to enable us to better design our mechanisms for the control of drunken drivers.

IMPLEMENTING AN IMPLIED CONSENT STATUTE CONTAINING SUMMARY SUSPENSION AUTHORITY

"Probable Cause" or "Reasonable Belief" that a DWI Offense Has Occurred

At the point of his observing what he believes to be a DWI offense, the patrolman or police officer is obviously acting on the basis of his personal judgment. That judgment has not yet been tested in court and, of course, it is possible that the officer may be in error. The Supreme Court of the United States discussed this risk of error in *Mackey v. Montrym* and stated that summary DWI procedures need not preclude "any possibility of error." The Court said that "something less than an evidentiary hearing prior to administrative action may be sufficient." Furthermore, the Court stated that the requirements of due process law are shaped by the risk of error on the part of the officer in "the generality of cases" and not in the rare exceptions or on the basis of a parade of horribles which defense counsel can so readily imagine. The Court concluded on this point that even though the fact of the existence of a DWI offense is disputed as between the officer and the licensee, the risk of error is not so substantial in itself to require the State to "stay its hand" pending the outcome of an evidentiary hearing on credibility and conflict in evidence because of that fact dispute.

Arrest, Accident, or Refusal of a Preliminary Breath Screening Test

It does not appear to be a requirement of Federal constitutional law that a person be formally placed under arrest before an officer, having probable cause or a reasonable belief that a DWI offense has been committed, may demand a chemical test. Many, if not most, State statutes seem to assume that the licensee will be placed under arrest as part of the transaction in which the chemical test is demanded. But it is not clear that an arrest is mandated by the United States Constitution. Again, perhaps such an arrest would be required under a State constitution and the motor vehicle administrator and legislative draftsman would be well advised to verify the State law on this point.

Notice of the Effects of the Test Results or the Effect of Refusal to Submit to Testing

The dissenting judges in *Mackey v. Montrym* pointed up the problem of notice of procedural rights and remedies in cases of summary license suspension. They said "reasonable notice of a procedural right is itself integral to due process." They were attempting to establish the proposition that it is a necessary component of due process for an officer to notify a licensee of the availability of a post-suspension review or hearing along with information as to how that hearing opportunity is to be implemented; the availability of a hardship or a limited license; and the availability of judicial review of any administrative action. The majority in *Mackey* did not decide this issue of notice. The Massachusetts statute involved did not expressly require notice of the availability of an immediate review by the Registrar of Motor Vehicles. The point to be made is that a State has little to gain if it fails to require comprehensive notice to be given to a licensee when an officer is about to summarily revoke the driver's license. Therefore, State implied consent statutes which authorize summary revocation should be reviewed to make certain that they require such notice or, in the absence of legislative action, the motor vehicle administrator should promulgate rules and regulations which require notice of all available procedure rights and remedies. Since the *Mackey* majority did not decide the notice issue, States should make adequate provision for comprehensive notice in anticipation of a possible shift of votes among the members of the United States Supreme Court on this issue.

At this point in the sequence of events, it becomes significant to ask the question whether the State purports to impose summary revocations on non-resident drivers who are operating on licenses issued by other States. The Minnesota statute is not limited in its coverage to holders of Minnesota licenses. On the other hand, the Delaware statute authorizes a patrolman to seize only a Delaware license. Of course, this question is ultimately resolved in the State legislature.

Chemical Test Taken and Failed or Licensee Refuses to Submit to Testing

Obviously if the driver passes the chemical test (usually a reading of below .10) he is cleared and no summary revocation is authorized. If the test results show a BAC level of more than .10, Minnesota and Delaware statutes provide for summary license revocation. In addition, and of primary importance, both Minnesota and Delaware provide for license revocation for refusal to submit to chemical testing where an officer has "probable cause" or "reasonable belief" that a DWI offense has been committed.

Both Minnesota and Delaware revoke the license for different periods of time depending upon whether the revocation is based upon) refusal to submit to a test. In Delaware the license is suspended for one year for refusal to submit to testing, while failing the test leads to a revocation of three months for a first offense, one year for a second offense, and eighteen months for more than two offenses. In Minnesota the license is revoked for six months for refusal to submit to chemical testing, whereas it is suspended for only ninety days if the test is taken and failed. Is it a violation of due process of law for a State to impose such different sanctions where DWI is only believed to have occurred and has not yet been "proved" in court?

Referring again to *Mackey*, the Supreme Court there stated that it is not a required element of due process that a State pursue other alternatives. Thus, States need not take an "all or nothing approach" in the DWI field because of the acute safety hazard involved. Furthermore, the Court said this disparity in sanctioning is acceptable because the State has "great leeway" in the field of highway safety and that due process allows a State to adopt an incentive policy which encourages drivers to submit to testing because of the lesser sanction imposed for taking—and failing—a chemical test. An important distinction between the Minnesota and Delaware statutes and the Massachusetts statute involved in *Mackey* is that the dissenters in *Mackey* were quite upset because the license was not suspended if the test was taken and failed. In both Minnesota and Delaware the license is susended if the test is failed or if the test is refused. It seems these two States are in a stronger position than was Massachusetts in *Mackey* and, perhaps, because of the more equitable treatment, a less passionate dissent might be expected.

Temporary Driving Permit Issued by Officer

At this point the State must once again face the question of whether it is going to seize out-of-state licenses and issue temporary driving permits to non-residents who are operating on its highways. Minnesota appears to treat all drivers alike and seize out-of-state licenses, issuing to non-residents the usual seven-day temporary permit. Delaware officers seize only Delaware licenses and issue a ten-day temporary driving permit. If, during that ten-day period the licensee requests an administrative hearing, the license revocation is not effective until the final decision of the administrative hearing officer has been rendered. Therefore, requesting the administrative hearing in Delaware has the effect of continuing the temporary permit in effect until final administrative resolution of the question. In Minnesota, the seven-day permit expires and is not renewable, but the statutes provide for the issuance of a limited license on conditions and limitations which the commissioner believes to be necessary in the interest of public safety. These may include reexamination, attendance at a driver improvement clinic, or attendance at counseling sessions. Further, a license may be limited to the operation of particular vehicles and to particular classes and terms of operation.

The importance of such temporary driving permits should not be underestimated. One of the concerns of the United States Supreme Court has been the duration of the deprivation of the rights enjoyed by a licensee who has been summarily suspended. The temporary license—limited license combination and the extension of the temporary permit if a hearing has been requested both serve to alleviate due process tensions caused by the summary revocation and seizure of a license.

Officer's Certification of Probable Cause or Reasonable and Probable Ground that a DWI Offense Was Committed

Minnesota and Delaware are similar in that the officer certifies to the grounds of his belief and further certifies that the licensee refused to submit

to a chemical test or that a test was administered and that the licensee failed the test. The Massachusetts statute involved in *Mackey* required that a third person endorse the certification along with further endorsement by the police chief prior to its submission to the motor vehicle administrator. The two additional endorsements seemed to impress the majority of the United States Supreme Court to some extent on the question of risk of error in suspending a license solely on the basis of the officer's certification. The Delaware and Minnesota statutes do not appear to require additional endorsements. Such endorsements are probably not necessary as a matter of due process of law to justify basing a revocation decision on the certification; nevertheless, they do serve to corroborate and buttress the observations and conclusions of the certifying officer. Driver licenses seized by the officer are forwarded to the department of motor vehicles along with the certification.

Administrative Review; Judicial Review; Administrative Hearing

One of the provisions in the Massachusetts statute approved in *Mackey* was the opportunity for an immediate hearing before the Registrar contesting the validity of the officer's certification. The Court said that the independent scrutiny of the officer's report by a detached public officer would be sufficient to minimize the types of errors which could be conducted without an evidentiary hearing. The Court added that failure of Massachusetts to provide an opportunity for a driver to respond to the officer's report in writing prior to suspension did not substantially affect the reliability of the pre-suspension process. The Court stressed that the Registrar could not suspend the license if the officer's report was materially defective. The Massachusetts hearing became available the moment the driver surrendered his license and included hearing officer authority to permit the attendance of witnesses or the gathering of relevant evidence. The first decision of the Registrar (hearing officer) could be appealed to the Board of Appeal within the driver licensing agency. Ultimately, it could be reviewed in the Massachusetts courts. Minnesota provides opportunity for an administrative review of the order of revocation. Such review may be sought at any time during the period of revocation. The Commissioner or his agent is to review the order, the evidence upon which the order was based, and any other material information brought to his attention and "determine whether sufficient cause exists to sustain the order." The Commissioner is required to report the results of his review within 15 days of receiving the request for administrative review. Actually, this "review" is an abbreviated form of administrative hearing. The statute does not expressly authorize the calling of witnesses or the review of affidavits, but neither does it prohibit their consideration. The statute does not prevent the driver from being represented by counsel. Although there are obvious variations, the Minnesota "review" is very similar—if not comparable—to the Registrar review in Massachusetts. In my opinion, the Minnesota "review" meets the constitutional requirements of due process because it is essentially the same type of proceeding as approved in Massachusetts.

In either a "review" or in a full-blown administrative hearing, the general principle is that the rules of evidence are relaxed. Material which could not go to a jury may well be admitted into the record. Some State statutes indicate that the rules of evidence in civil non-jury trials apply to administrative hearings. On a moment's reflection, one begins to realize that judges commonly take evidence for "what it's worth" in bench trials. The theory is that the judge is experienced and is capable of separating the worthy evidence from the unworthy evidence whether it be hearsay or whatever. Accordingly, the same general principle applies to an administrative "review" or administrative "hearing." Thus, it is common to see hearsay admitted in administrative proceedings.

Most State administrative procedure legislation (APA) allows any written or documentary evidence that is relevant to the issues. However, admission of such material is subject to the right of cross-examination as may be necessary for a full and true disclosure of the facts in the record. Thus it is erroneous to assume that hearsay is always admissible in an administrative hearing. For, if it is not controlled by a statute (e.g., a State APA) it may be controlled by relevant principles of due process of law. In other words, even though the program for summary revocation of driver licenses may be specifically excluded from the State administrative procedure legislation (APA), the right of cross-examination under due process of law principles may prevent introduction of hearsay to prove a critical and disputed evidentiary fact. Nevertheless, the point of all these rules is to allow into the record reliable hearsay where possible.

Because chemical testing has been shown to be reliable, the mere fact that it is hearsay and not subject to cross-examination may have no bearing on its admissibility. Many critical and disputed

evidentiary facts are determined in administrative proceedings on the basis of examinations, inspections, and tests which have not been cross-examined. On the other hand, where the officer certifies to a chemical test refusal, the issue of reliabilty is more crucial. Ordinarily one could expect the officer's certification to be admitted in evidence, but a strong argument for opportunity to cross-examine may necessitate the officer's availability to testify. These general evidentiary principles apply to all forms of administrative adjudicatory proceedings.

As an alternative to administrative review, the Minnesota licensee may, within thirty days following notice of revocation, petition the appropriate county or municipal court for review. The filing of such a petition shall not stay the revocation. Minnesota statutes require that the hearing shall be to the court, and in the same manner as hearings upon pre-trial motions in an accompanying criminal prosecution, if any. The hearing is to be recorded and the Commissioner may appear through an attorney. To minimize the "duration" of the time the licensee is deprived of his driving privileges, Minnesota requires the hearing to be held "at the earliest practicable date" and no later than sixty days following the filing of the petition for review. A recent Minnesota case indicates that the judicial administrator has succeeded in keeping such hearings well within these time limits. The scope of the hearing is limited to: (1) the officer's "reasonable and probable grounds to believe"; (2) whether the officer informed the licensee of his rights and of the consequences of taking or refusing the test at the time of the request for the test; (3) either (a) whether the person refused to permit the test or (b) whether the test was taken and the results indicated a BAC of 0.10 or more. In addition, the issues of whether the testing method used was valid and reliable and whether the test results were accurately evaluated are within the scope of the hearing. By statute, Minnesota provides certified or otherwise authenticated copies of laboratory or medical personnel reports, records, documents, licenses and certificates are admissible as substantive evidence in the hearing.

Delaware's statute is somewhat unique in that it provides that no revocation becomes effective until the expiration of a ten-day period during which the licensee is allowed to request in writing an administrative hearing. If no request for hearing is filed within the ten-day period the order of revocation becomes effective. If a request for hearing is filed, revocation is not effective until the final decision of a hearing officer resulting in a decision adverse to the licensee. By requesting the hearing, therefore, the licensee automatically stays the effect of the revocation until final administrative action. Apparently the licensee continues to drive on the basis of the ten-day temporary license issued by the officer when the permanent driver's license was seized and forwarded to the motor vehicle administrator. It is interesting to note that Delaware statutes provide that the administrative decision is final and not subject to judicial review or appeal unless the administrator rules against the person at a hearing requested by the licensee. In other words, the licensee must request an administrative hearing to have standing to obtain judicial review of the administrative action.

The Delaware administrative hearing is conducted by the Secretary or a hearing officer. The scope of the hearing includes the issues of (1) whether the police officer had probable cause; (2) whether the chemical test was conducted and the person was arrested on that occasion; (3) whether by a preponderance of the evidence it appears that the licensee had committed a DWI offense (for that purpose a showing of a BAC of .10 or more "shall be conclusive evidence of said violation."); (4) whether the licensee refused to permit the test after being informed of the penalty of revocation for such refusal. The hearing must be scheduled within 30 days following the filing of the request. It is apparent that there is a difference between the specific issues to be considered in an administrative review and those to be considered in a more elaborate administrative hearing. Basically the administrative review purports only to evaluate the legal sufficiency of the officer's certification. Of course, the licensee may raise fact issues, but it is probably constitutional for the agency to rely on a proper certification at that point in the procedures. If the administrative review is followed by an opportunity for a prompt administrative hearing that is somewhat broader in scope, there should be no due process problem. Furthermore, the administrative review might well be conducted on the basis of documents only. That is to say, a form of "mail" hearing could arise out of the process. It is common in administrative proceedings to take all evidence in writing where to do so does not unduly prejudice the rights of a party to the hearing. Many administrative procedure acts, including the Federal APA, contain such language. Even though an APA may not be directly applicable, it would seem that the principle would apply by analogy to an administrative review—even one conducted by mail.

In my judgment the specific issues to be considered in an administrative hearing or judicial review should be limited in scope as Delaware and Minnesota provide. The purpose of the evidentiary hearing is to focus on the disputed fact issues on which the summary suspension was based. By specifying the limits on the scope of the hearing, Delaware and Minnesota appear to be acting within their authority to keep the hearing (or judicial review) within bounds. Obviously, the scope of the issues should not be too "tight." My examination of the Delaware and Minnesota statutes suggests that the scope of the review or hearing is balanced and the relevant issues are included in the statement of the scope of the proceeding. Therefore, the due process opportunity to raise relevant issues is appropriately provided.

In administrative proceedings, whether informal or formal, there is sometimes concern that the hearing officer must be an attorney. This is not constitutionally required as a matter of due process of law. Driver analysts, hearing officers in unemployment compensation cases, and other hearing officers who do not have legal training commonly serve in this capacity. Nevertheless, an administrative procedure act (if relevant) or the agency's own statutes might require the hearing officer to be an attorney. In my judgment an experienced driver analyst is adequate for the purpose. Candidly, a non-attorney hearing officer might be desirable. Some attorneys can become overly judicial in conducting an administrative hearing and can, perhaps without realizing it, convert an administrative procedure into a courtroom trial. This is unfortunate, for the legislature obviously chose the administrative model for hearings by placing responsibility in the agency rather than in the courts. It follows that if the legislature had wanted the agency to follow court procedures it would have so required or it would have required the hearing to be held in a court.

Whether the administrative proceedings should be electronically recorded turns in part on the availability of further review. The Minnesota administrative review and the Massachusetts review before the Registrar, as in *Mackey*, probably need not be recorded because of their very informal nature and the fact that most of the evidence on which the review was based is presented in written form. When the procedure becomes more formal, as in the Delaware administrative hearing or in the Minnesota judicial review, the need for recording the proceedings becomes more significant for the reason that the decision may later be appealed to the courts. If later court review is on the record made before the agency or the lower court, it is important that the record be sufficiently complete to permit a meaningful evaluation of the decision. In many circumstances, the proceedings are recorded but are not transcribed unless an appeal is filed. The licensee who appeals an unfavorable decision could be required to pay the necessary costs of transcription to provide the record for the appeal.

Finally, at this point in the sequence of events the possible application of State administrative procedure legislation (APA) should be considered. At the outset I must point out that Delaware and Minnesota make clear that the state APAs do not apply to administrative review (Minnesota) or a requested administrative hearing (Delaware). The reason I mention this is that in some States the implied consent statutes may not be coordinated with the APA. As I suggested in 1982 at the Institute, it is important to be aware of the potential impact of the APA on such proceedings. If there is no coordination, ingenious defense counsel may find a way to use APA provisions to circumvent the summary suspension program. For example, a state APA might permit a hearing broader in scope than would be desirable. Further, the APA might include provisions for allowing a stay of the revocation. The full range of possibilities could be determined only by a thorough examination of the state APA.

Limited Licensing; Driving on a Temporary Permit

One of the due process concerns of the United States Supreme Court is the duration of the deprivation of the right to drive resulting from summary revocation. This issue may be largely treated and tension alleviated by providing for limited licensing. For example, in Minnesota, the Commissioner has the authority to issue a limited license to a person under revocation. The availability of this procedure for relieving the tension of being unable to drive provides further due process support for the summary suspension program. Delaware relieves the tension by delaying the effective date of the revocation until a final decision is rendered by the hearing officer, if a hearing is requested within ten days after the police officer serves notice of intent to revoke. However, recall that if a hearing is not requested the Delaware revocation becomes final after the ten days and the driver is without a license. An advantage of both Minnesota and the Delaware systems is that the initiative is with the driver. If he does not seek a limited license (Minnesota) or

if he does not request an administrative hearing (Delaware) he will be off the road at the end of the seven- or ten-day period. Consequently, these statutory systems contain a number of inducements that may inspire the driver to continue to pursue the administrative process. In a sense, the driver is drawn into a "license chase."

Although it is not strictly relevant to limited licensing or driving on a temporary permit, mention should be made of one criterion for licensing involved in the Delaware and Minnesota statutes. The Delaware statute permits relicensing of a revoked driver upon completion of a course of instruction or a rehabilitation program. An additional criterion limiting such relicensing is that the individual must have "had a favorable character investigation" conducted by the Division of Motor Vehicles. In Minnesota reinstatement after expiration of the revocation is conditioned upon successful completion of a driving test, compliance with alcohol treatment or counseling programs previously prescribed, and, finally, "any other requirements imposed by the commissioner and applicable to that particular case."

The Delaware character investigation raises serious questions of due process of law. The relationship between proper operation of a motor vehicle (including sobriety while driving) and "favorable character" is highly tenuous if it exists at all. Lack of a rational relationship to highway safety could render this broadly expressed criterion unconstitutional as a denial of substantive due process of law. The discretion vested in the Minnesota Commissioner is not objectionable upon its face, but the Commissioner should be certain that any additional conditions imposed are clearly related to highway safety and proper operation of a motor vehicle.

Appeal to the Courts

The Delaware statute permits appeal of the final administrative action only if an administrative hearing was previously requested by the driver. Even so, the appeal does not operate as a stay of the license revocation. Such Delaware appeals are not conducted in accord with the Delaware administrative procedure act. The Delaware APA lists those agencies to which it applies and the Delaware licensing agency (Department of Public Safety) is not among them. Thus the Delaware court appeal is apparently controlled by the rules of civil procedure or other statutes.

Likewise, in Minnesota the initial judicial review by a county or municipal court may be appealed to the district court. The Minnesota appeal to the district court is according to the rules of procedure for appeal of misdemeanor crimes.

A Discussion of Administrative License Suspensions*

John W. English, Legal Consultant
Falls Church, Virginia

In December of 1983 we completed a study for the National Highway Traffic Safety Administration entitled "State Laws on Early License Revocation for Driving While Under the Influence." This study included a revised edition of the "Model Revocation on Administrative Determination Law."

Our purpose here today is to briefly describe this study and some of the more important provisions of the model law, and then to explore with you some issues that relate to the interstate aspects of driver-license actions based upon administrative determinations, commonly referred to as administrative *per se* suspensions or revocations.

The Model Law

The model law provides for license revocation, prior to any conviction, on the basis of an administrative determination that the person drove a motor vehicle while having an alcohol concentration of 0.10 or more. The idea is to allow the department to quickly remove this driver from the highways, without waiting for the conviction on the criminal charge.

When the chemical test results show an alcohol concentration of 0.10 or more, the arresting officer must give the person notice of license revocation that is effective 15 days after the notice is given. If the person holds a valid license issued by the state in which the arrest takes place, the officer must seize that license and issue a temporary license valid for 15 days.

The law provides for license revocation for a period of 3 months on a first offense, and 1 year on a second or subsequent offense. No hardship or restricted license is permitted during the revocation period.

The person who has received a notice of revocation may request an administrative review by the department. This is not a hearing but a review by the department of relevant papers, including any statements and evidence submitted by the person. This affords the person an opportunity to present his side of the matter and to have the revocation procedure terminated where revocation is clearly not warranted. If the review is requested promptly (within 8 days of the revocation notice), the review must be provided before the revocation becomes effective. If requested later, the review must be provided within 7 days of the request. No stay of the revocation is provided.

The person is also entitled to a full administrative hearing, regardless of whether he has an administrative review. The hearing must be provided within 30 days of the hearing request. Obviously, it will not be held prior to the effective date of the revocation, since that occurs 15 days after the revocation notice is given. No stay of the revocation is provided. This is one of the most important concepts of the law. The person cannot delay the revocation by seeking a hearing. There is no incentive to request a hearing only to postpone the revocation. This should greatly reduce the number of requested hearings.

This two-step hearing process is adapted from the Minnesota law. It provides an opportunity prior to the effective date of the revocation for the person to obtain sufficient due process to prevent a clearly erroneous deprivation of the driving privilege. It also provides an opportunity for a full administrative hearing, but the license revocation can become effective quickly, without waiting for completion of the full hearing.

The first edition of the model law was published in September 1982, after a study of the six State laws that had been adopted at that time. During 1983, 13 additional States adopted relevant laws, and several of the six States revised their earlier laws. In the fall of 1983, we reviewed all 19 of these laws and revised the model law to reflect the best

provisions of those laws. The study includes the text of the model law, with comments and implementation guidelines, summaries of the 19 State laws, and tables comparing various aspects of those 19 laws and the model law. The study also includes a reprint of a paper by Professor John Reese discussing the constitutional aspects of the problem.

Interstate Problems Posed by Administrative *Per Se* Laws

Administrative *per se* is an idea that has quickly caught on in a big way. It seems likely that within only a few years almost all States will have a law of this type. Clearly, we need to consider just how these laws will affect the interstate aspects of driver licensing control.

Unfortunately, the existing laws, including the model law, have failed to address this part of the problem. There are many unanswered questions. I want to discuss some of them with you today.

Let's begin with some plain and simple facts about driver licensing. If my home State suspends or revokes my driver's license, one effect is to automatically strip away my nonresident operating privilege in every other State. This is true because without a valid license issued by my State of residence, I have no nonresident operating privilege in any other State.

The corollary of that simple truth is not true, however. If a State in which I do not reside suspends or revokes my nonresident privilege, that will not necessarily result in the suspension or revocation of my driver's license in my home State. In fact, at least theoretically, my nonresident privilege could be revoked by every other State in the Union, while the driver's license issued by my home state remains valid.

Is this difference justifiable? If my conduct in another State (let's call it AwayState) warrants suspension or revocation of my nonresident operating privilege, shouldn't that conduct also warrant action by the State (HomeState) that issued my license?

Perhaps it should. Then again, perhaps not. If AwayState suspended my privilege for some unique or arbitrary reason, we would not expect HomeState to follow suit. But what if my conduct in AwayState would have required revocation of my license if the conduct had occurred in HomeState? What if, for example, my conduct involved driving while under the influence? Should it make any difference whether the conduct took place in my home State or in some other State?

That's not really a new issue, is it? We decided a long time ago that it shouldn't make any difference. In the case of serious offenses that occur in some other State, HomeState should take action against my license just as it would if the offense had occurred at home.

We put that concept in the Uniform Vehicle Code. Assuming that both States have adopted the code's provisions, if I am convictd in AwayState of any traffic offense, AwayState must report the conviction to HomeState [UVC S6-202 (b)], and in the case of serious offenses, HomeState must revoke my license just as if the offense had occurred in HomeState [UVC S6-203 (a)]. The offenses covered are homicide by vehicle, driving while under the influence, driving an uninsured vehicle, any felony in the commission of which a motor vehicle is used, failure to stop and render aid when involved in an accident, perjury in a statement to the department, and unauthorized use of a motor vehicle.

We put the same concept in the Driver License Compact, although it's a bit more limited. It applies only if both States are parties to the compact, and only to the offenses of homicide by vehicle, driving while under the influence, felony in the commission of which a motor vehicle is used, and failure to stop and render aid when involved in an accident.

Of course, not all States have adopted this concept, but most have. About 40 States have the relevant Uniform Vehicle Code provisions, although most make the action discretionary rather than mandatory. Thirty States have become parties to the Driver License Compact. We can conclude that while adoption of the concept has not been perfect, we are probably safe in saying that a person *convicted* of driving while under the influence in AwayState will generally have his license revoked or suspended by HomeState.

But note carefully that it only works if the person is *convicted*. The conviction has been the cornerstone of our approach to giving interstate effect to driver-licensing control. In the absence of a conviction, the picture is very different.

We can see the difference very clearly if we look at the implied-consent laws. If AwayState revokes my nonresident privilege because I refused to submit to a chemical test under the implied consent-law, will AwayState report that action to HomeState? The Driver License Compact does not require such a report. The Uniform Vehicle Code [UVC S 6-202 (c)] does, but only 12 States have adopted the provision. Assuming that AwayState does report the action to HomeState, will HomeState take action against my license? The Driver License Compact does not require such ac-

tion. The Uniform Vehicle Code [UVC A 6-203 (c)] authorizes license action, but only six States have adopted the provision.

We are forced to conclude that where AwayState suspends or revokes a nonresident privilege due to a refusal to submit to a chemical test, HomeState will generally not receive a report of the action or the refusal. In the few cases where a report is made, it is even less likely that HomeState will take any action against the person's license on the basis of the report.

Implied-consent refusals do not result in convictions. Because no conviction is involved, we have never effectively given interstate effect to implied-consent driver-licensing-control actions.

And now the States are busily adopting a new concept in driver-licensing control that, like implied consent, involves action taken on the basis of an administrative determination without a conviction. Are we going to face the interstate issues this time around? Or are we going to let it slide as we did with implied consent?

Here are some of the issues involved:

1. If AwayState revokes my nonresident privilege under its administrative *per se* law, should that action be reported to HomeState?
   a. I will probably be convicted of the criminal charge eventually. Perhaps AwayState should wait and report only the conviction to HomeState. But the object of the administrative *per se* approach is to get the person off the road quickly, without waiting for the conviction. Isn't this also important with regard to the action HomeState will take against my license?
   b. If AwayState reports the revocation to HomeState but I am later acquitted of the criminal charge, should AwayState also report the acquittal?
   c. Perhaps AwayState should report to HomeState only if HomeState also has an administrative *per se* law.
   d. What exactly should be reported? The fact that my nonresident privilege was revoked? The fact that a determination was made that I drove with an excessive alcohol concentration? A copy of the full record of the case, including all relevant evidence? The latter would be very impractical; yet HomeState will not be able to make any review of the determination made in AwayState without such a record.
2. Assume that AwayState does make a report to HomeState; what should HomeState do with it?
   a. Should HomeState revoke my license?
   b. Should such action be mandatory or discretionary?
   c. On what basis should the action be taken? The fact that AwayState revoked my nonresident privilege? The fact that AwayState made an administrative determination that I drove with an excessive alcohol concentration? A determination by HomeState that my conduct in AwayState would have warranted revocation if the conduct had occurred in HomeState?
   d. How should differences between the HomeState and AwayState laws affect the license action? For example, what if the laws specify different alcohol-concentration levels?
3. If HomeState revokes my license, what kind of hearing, if any, should be provided to protect my due-process rights?

Overcoming Problems and Costs of Administrative Hearings*

James Latchaw, Traffic Safety Programs
National Highway Traffic Safety Administration

Some of the worrisome questions related to successful implementation of administrative revocation programs in driver licensing, frequently referred to as "administrative *per se*," are those related to administrative hearings. These include:

How many hearings can be expected?
Where should they be conducted?
Who should conduct them?
Why do hearings create problems for the police?
How can some of these problems be overcome?

Perhaps the most logical approach to these questions, or at least the easiest, is to address them in order.

How many hearings can be expected?

While there is variation among the States on the percentage of DWI offenders who request hearings under administrative *per se* provisions, it appears that in jurisdictions where a special advantage can be gained through the hearings the defendants will quickly overload the State's capacity to conduct them. Examples of this may be seen in the experiences of Minnesota and Iowa.

In Minnesota, the law formerly provided that the hearings be conducted by a Municipal Court judge and an assistant attorney general was routinely scheduled to represent the State. This resulted in severe scheduling problems, and at that time the law also provided that the revocation be stayed until the hearing was conducted. Because of the delays that resulted from this situation, in the words of Joel Watne, Special Assistant Attorney General, it almost came to be considered malpractice if a defense attorney failed to request a hearing. The State was receiving about 1,000 hearing requests per month and clearing 900 of them. On January 1, 1982, they had 1,400 pending cases that increased to 4,800 before a change in the law enabled them to be cleared.

In 1983, the law was changed to provide for an administrative review, although a judicial review still is available if desired. The administrative review was designed as a paper process, where a statement by the offender and all pertinent records are carefully scrutinized for a miscarriage of justice. If no miscarriage is detected, the revocation is imposed on schedule even though a judicial review still may be requested. This informal review procedure is speedy and is designed to remedy obvious errors while still providing due process. The revocation is not stayed pending judicial review.

This move to administrative reviews, and not staying the revocation pending judicial review, resulted in an immediate drop in hearing requests. In 1984, during which 36,653 revocations were imposed, a total of only 579 administrative reviews and 2,666 judicial reviews were requested. These were easily handled by an agency that had been busting its britches to clear 900 hearings a month. The problem of dilatory hearing requests has been under control ever since.

Iowa had a different problem. In that State hardship licenses are issued to eligible applicants, but they were issued only as a result of a hearing where an investigation was conducted of the applicant's need and eligibility, and the revocation was stayed pending the hearing. Consequently, when DWI arrests soared as a result of police approval of the administrative *per se* procedure the increased number of persons requesting hardship licenses through the hearing process soon overloaded the system. State licensing officials eventually reduced the backlog of cases by changing their application procedure for hardship licenses.

This experience has been common for all States that have adopted administrative *per se*. Those that make it advantageous to the offender to request a hearing are innundated with hearing requests. In States where a hearing request does not stay the revocation, the requests are fewer.

How many hearing requests might be expected?

* Presented at 1986 Driver Licensing Seminars

For a State with a law that does not make hearing requests advantageous to the offender it may be that 20% or 25% will request hearings. Based upon the Minnesota experience, if administrative review procedures are adopted this may be reduced to 10% or less.

In January, 1986, we conducted a limited survey of 10 States to determine the first year costs of the States' administrative *per se* programs, in excess of what would have been expended for a continuation of the former more traditional procedures. However, hearing data also were collected, as follows:

State	Percent Hearings Requested	Estimated 1st Year Costs Over Previous Program	Additional Persons Employed
Colorado	90%	$ 390,000	(not clear)
Delaware	23	102,000	6
Indiana	(judicial)	100,000	5
Iowa	40	164,000	6
Louisiana	20	200,000	12
Maine	19	106,000	4
Mississippi	(judicial)	60,000	3
Nevada	25	77,000	3
North Dakota	33	110,000	3
Utah	29	175,000	8

Where should they be conducted?

When administrative *per se* was first adopted in West Virginia the law provided for the hearing to be conducted in the county of the offender's residence. This was a mistake because it created a hardship and expense for the police who had to travel around the State to testify against those persons they had arrested for DWI. This discouraged DWI arrests and adversely impacted the program.

The hearing should be conducted in the county where the offense occurred or other location designated by the chief driver licensing official. This would permit the hearing to be conducted in the county adjacent to the one where the arrest occurred if, for example, that was most convenient for all concerned.

Who should conduct the hearings?

While some believe it lends stature and credibility to driver licensing hearings to be conducted by the judiciary, in some States it also tends to perpetuate the delays, compromises and weaknesses of that system. Administrative *per se* is meant to avoid those problems. Also, judges usually are lawyers. In administrative proceedings, whether formal or informal, it is believed by some that the hearing officer should be an attorney. This is not constitutionally required and very likely is not even a good idea because some attorneys become overly judicial in conducting administrative hearings and, possibly without realizing it, convert an administrative procedure into a criminal trial.

The application, testing and issuance phases of driver licensing all are conducted administratively as are the recordkeeping and driver improvement functions, including sanctioning in most States. There seems little merit in turning these functions over to the judiciary, nor do most judges want them. The court resources are so overburdened that the best place for hearings probably is to leave them in the hands of the licensing agency. Even in States that conduct administrative reviews there is no constitutional reason why that review could be not followed, if requested, by a full blown hearing conducted by the same agency, to be followed by an appeal to the judiciary if warranted and desired.

Finally, there is value in uniformity. It is reasonable to assume that if administrative hearings are conducted throughout the State by one agency they are more likely to result in all applicants being treated equally than if conducted by the many courts of the State.

Why do hearings create problems for the police?

In many States the oft-repeated argument is heard that the arresting police officers must testify at administrative hearings (as well as criminal trials) because the offender has a right to face his or her accuser. This is known as the right to confrontation. A considerable burden in police officer

time (or overtime) and expense can accrue in States that strictly observe this right for purposes of administrative hearings. However, some are finding that the right does not necessarily apply to administrative hearings and (for chemical test analysts) perhaps only to a limited degree for criminal trials.

In *North Carolina* v. *Smith*, 312 N.C. 361, 323 S.E. 2nd 316 (1984), it was moved to reject the affidavit of a chemical test analyst, because the analyst had not testified in person and no opportunity was offered for cross-examination. The trial court admitted the affidavit as an exception to the hearsay rule. Upon appeal the State Supreme Court agreed and pointed out that many public officials would have to spend the greater part of their time in court as witnesses if such affidavits were not admitted as evidence and even though it may be possible to require the analyst to attend and testify in person it is sensible and more expedient that the public business not be deranged by requiring strict enforcement of the hearsay rule. The court also noted that the defendant had a right to subpoena the chemical test analyst as an adverse witness if desired.

Much the same decision was reached in Missouri when the arresting officer was not called to testify at an administrative hearing (*Collins* v. *Director of Revenue*, and *Johnson* v. *Director of Revenue*, May, 1985). In upholding the State procedures the Missouri Supreme Court pointed out that information submitted on the record was adequate to uphold the administrative license suspension and if the defendant had wanted the officer to appear she should have subpoenaed him. This is because the Missouri Administrative Procedures Act provides each party with the opportunity to call and examine (and to impeach) witnesses. Finally, the Missouri Court quoted the U.S. Supreme Court from *Dixon* v. *Love*, 431 U.S. 105–113 (1977), (quoting from *Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976)), that "something less than an evidentiary hearing is sufficient prior to adverse administrative action."

Based on these decisions it appears that each State should review its own constitution, administrative procedures act, and case law to make sure that sizable police costs are not being engendered when they are not needed, or cases being dismissed when the arresting officers fail to appear as witnesses at administrative hearings, when in fact there may be no legal requirement for them to do so.

How can some of these problems be overcome?

In the first place, the number of hearings should be kept to a minimum, while affording an appropriate level of due process to each offender. This may be achieved through the use of administrative reviews as described earlier, and by making sure that the violator and his attorney are not rewarded simply by requesting a hearing. If delays in the loss of the driving privilege can be achieved by requesting hearings, a large percentage of the offenders will request them regardless of merit. If defense attorneys can backlog the system through dilatory hearing requests, the State can expect many of them to be filed. If the license revocation is not stayed pending the hearing, the number of hearing requests will be reduced.

While an increased number of hearings may require at least a moderate increase in the number of administrative hearing officers, the greatest expense seems to be to the police. In most jurisdictions, police union agreements provide that when officers appear to testify during off duty time they shall be paid at least a certain minimum amount, such as for two hours or four hours duty time, or even for a number of hours at overtime rates. When added to the time required for the testimony the officer must provide at the criminal trial of the same DWI offender, the costs for testimony to be presented at the administrative hearing become burdensome.

To hold these costs down, in Iowa they accept police testimony by telephone. Minnesota avoids personal testimony through the administrative review process. In Missouri the Administrative Procedures Act specifically provides that witnesses can be subpoenaed by either side, and lacking that the officer's reports are considered adequate; and, in Illinois the law that established administrative *per se* also provided that the police need not testify at administrative hearings (presumably unless subpoenaed).

Based on the foregoing discussion one may conclude that the administrative review process may be the best means of expeditiously providing limited due process. It provides an adequate level of protection for the circumstances, plus being prompt and inexpensive. If the offender wishes to present information in person rather than in writing, in Minnesota the driver licensing headquarters office is available for that purpose during normal working hours, but no police officers are called to testify.

In studying the process, the Minnesota Supreme

Court in *Heddan* v. *Dirkswager* used the tests applied in *Mackey* v. *Montrym*; that is, the nature and weight of the private interest, the likelihood of erroneous deprivation, and the State interests served by the procedures.

The Court decided that the administrative review process was adequate for the occasion and in this case the public interest in (1) keeping the highways safe, and (2) avoiding fiscal and administrative burdens disproportionate to the nature of the private interest being revoked, was in fact paramount.

Costs of an Administrative Driver License Suspension/Revocation System

In the publication, "Minnesota's Double Barrelled Implied Consent Law," by Forst Lowery, he described costs of the Minnesota system as follows:

> Legislators and administrators considering an administrative revocation law are understandably concerned about possible costs of establishing and maintaining a system such as this report describes.
>
> There should not be any significant increase in costs to the driver license agency when a State adopts administrative revocation based on test results if that State already operates a conventional driver record system which posts revocations or suspensions based on convictions or other court-ordered actions. In fact, if a State operates a conventional system under which a mailed notice of revocation is necessary, there can be substantial savings and efficiency if the police officer, acting as an agent of the driver license authority, gives notice of revocation and takes possession of the regular driver license at the time a test is refused or failed.
>
> There *will* be additional costs if a law provides a *pre*-revocation hearing process because such a provision encourages filing dilatory hearing requests.[1]
>
> Minnesota did not experience significant added administrative expenses when the original 1976 law went into effect (even though another law, requiring alcohol problem assessments, was passed in that year and this also increased driver license office workload) and the employee complement has increased little since that time. In 1976, before the administrative revocation law, the complement of the Driver License Section, Driver and Vehicle Services Division of the Minnesota Department of Public Safety, was 20, of which 8 were driver safety analysts, who conduct driver license related interviews and who now perform administrative reviews when such reviews are requested. In 1983, the complement of the section was 34, of which 13 are driver safety analysts. An efficient administrative driver license revocation system does not involve much additional expense and may even cost-saving *if* these caveats are observed:
>
> 1. Allow police officer the choice of tests.[2] (Breath test results are immediate.)
>
> 2. The police officer gives notice of revocation and picks up the regular license certificate. (Saves mailing costs and denial of receipt.)
>
> 3. Hearings or reviews are *post*-revocation rather than *pre*-revocation and revocation is *not* stayed pending hearing or review. (Prevents dilatory appeals.)

In an effort to further identify total program costs, NHTSA staff conducted a telephone survey of 10 administrative *per se* States in January, 1986. The survey was to determine the approximate costs of the first 12 months of the program in excess of what would have been expended for a continuation of the former more traditional procedures.

[1] Editor's note: Mr. Lowery's point is well taken. If the State law provides that the revocation is stayed until the hearing is conducted it is to the advantage of every offender to request a hearing, followed by requests for continuances to further delay the process. This is not only expensive, but it creates long delays, and results in offenders continuing to drive while waiting for their hearings to be scheduled. Several States adopted laws that permit this to happen. In some of them (Iowa and Minnesota, for example) this resulted in offenders being arrested for second and third offenses during the time they were driving on a temporary permit issued as a result of the first one.

[2] Also, to reduce the burden on the police agencies, a procedure must be used that reduces the demand for officer testimony at the administrative hearings. In Minnesota this is accomplished through the administrative review process; in Iowa through telephoned testimony; in Missouri through a provision in the Administrative Procedures Act that provides the officer can be subpoenaed by either side; and in Illinois by entering into the law at time of enactment that the officer need not testify at the hearings (presumably unless subpoenaed).

Estimated costs and other data, per State, were as follows:

State	% Hearings Requested	Estimated 1st Year Costs	Additional Persons Employed
Colorado	90	$390,000.00	(not clear)
Delaware	23	102,000.00	6
Indiana	(judicial)	100,000.00	5
Iowa	40	164,000.00	6
Louisiana	20	200,000.00	12
Maine	19	106,000.00	4
Mississippi	(judicial)	60,000.00	3
Nevada	25	77,000.00	3
North Dakota	33	110,000.00	3
Utah	29	175,000.00	8

The consensus was that due to offsetting benefits, such as there no longer being a need to send tens of thousands of revocation orders by certified mail, or have them delivered by personal service, after the first year in most States the annual cost would be sharply reduced. Officials in Minnesota and North Dakota estimated the second and subsequent years of the program would cost little if any more than their previous conviction based system. Several other States estimated the annual cost to have been reduced by $50,000 or more in subsequent years.*

Advantages that were noted to the total highway safety system by the surveyed State officials included:

- Increased guilty pleas. Because of the prompt suspension/revocation, the offenders have little incentive to request court delays.
- Few claims of failure to receive the suspension notice. Since the notice is served at the time of arrest and attested to by the arresting officer the offender has difficulty substantiating a claim that he did not receive it.
- A high level of success in picking up the invalid license certificate. This is an additional advantage in having the arresting officer serve the notice of suspension/revocation.
- Few claims of failure to receive due process. The combination suspension notice/temporary driving permit also provides information on recourse that is available to the defendant (for example, how to request a hearing), so potential claims of injustice are forestalled. The Supreme Courts of three States (Indiana; Minnesota; Missouri) have upheld the constitutionality of administrative suspensions, and no Supreme Courts have ruled against it.
- Reduced alcohol-related crashes and fatalities. Officials in all States surveyed commented on reduced crashes. Iowa and Indiana experienced the fewest fatalities in 40 years following adoption of administrative revocation procedures as part of their Statewide comprehensive highway safety programs.
- A reduced number/percentage of drunk drivers on the highway. Several States verified that the police are having increased difficulty in detecting and apprehending drunk drivers (Delaware; Iowa; Minnesota; Mississippi; Oklahoma) in spite of improved police training and technology. In Minnesota roadside surveys revealed that after midnight one driver in 24 tested .10 BAC or higher, compared to results from similar surveys conducted 10 years ago when it was determined that one driver in 10 tested .10 or above. This is a reduction of 60%!!

*For the interested reader it should be reported here that, during the course of a public hearing by the National Commission Against Drunk Driving, in Chicago, Illinois, on February 7, 1985, Mr. Gordon Sweitzer, Director of the Iowa Motor Vehicle Division, noted that his State has computed the administrative costs of hearings as follows:

Informal settlement hearings	$45
Contested case hearings	115
Agency review	25
Judicial review	435
If all due process rights were pursued	710

Based on these data, the State has proposed a hearing fee of $200, that would offset all costs and make that portion of the program financially self-sufficient.

- Vastly improved promptness in imposing the suspension. It is a judicial precept that to be most effective, punishment must be swift and certain. In an earlier survey officials from all 21 jurisdictions with administrative *per se* agreed that the license suspension can be imposed within an average of 45 days or less from the day of arrest. In Minnesota, 95% are suspended within 7 days; in Delaware (due to differences in State laws) 75% are suspended within 15 days. In States where the license suspensions are based upon court convictions the average delay may easily be six months or longer.

For these reasons, administrative *per se* is strongly recommended by the Presidential Commission on Drunk Driving, the National Commission Against Drunk Driving, the American Association of Motor Vehicle Administrators, the National Highway Traffic Safety Administration, the National Transportation Safety Board, other national, State and local agencies and organizations, citizen support groups, and concerned citizens.

Appendix

National Transportation Safety Board*

Administrative License Revocation Laws

While motor vehicle administrators historically have had ample statutory authority to revoke or suspend the licenses of drivers who pose a threat to the public, these administrators traditionally have been conservative in the use of that power. The result has been that most motor vehicle departments take no action to suspend licenses of drivers who violate drunk driving or implied consent[28] laws until they receive a formal notice from the court of the conviction of the individual for a drunk driving or implied consent offense.[29] Moreover, many of those who take a chemical test and produce a result over the legal limit will also fail to lose their licenses because of court procedures which permit reduction in charges or pretrial diversion.

Recently, the States have been enhancing their traditional presumptive drunk driving laws, which make it an offense to drive "under the influence" of alcohol, with a new provision which makes it "illegal per se" to drive with a given blood alcohol concentration. This approach is typical of that initially established in Scandinavia and recently adopted by most industrialized countries around the world. The establishment of an "illegal per se" provision increases the objectivity of enforcement and prosecution of drunk driving by defining the offense in terms of quantitative breath or blood test, thereby avoiding the subjectivity involved in judgments regarding the extent of driver impairment.

Building upon this approach, the State of Minnesota in 1976 added to its implied consent statute a provision permitting the suspension of driving privileges by the director of motor vehicles not only in the case of a test refusal, but also when a driver accepted the test and the test result was at or above the prohibited BAC limit of 0.10 percent. Under this "administrative per se" (administrative license revocation) law, the license is suspended or revoked on the basis of a Motor Vehicle Department finding that the person drove a motor vehicle while having a BAC of 0.10 percent or greater.[30]

In 1982, Iowa and Oklahoma followed Minnesota's lead and enacted similar administrative revocation laws. Earlier, in 1981, West Virginia had passed a law modeled on the District of Columbia practice authorizing suspension of a license before a conviction on a charge of driving while under the influence of alcohol or drugs. Delaware adopted a similar law in 1982. During 1983, 13 additional States adopted administrative revocation laws. (See table 5.)

Because of the interest generated by the Minnesota law, NHTSA undertook a study of Minnesota's administrative revocation process.[31] As a companion effort, the NHTSA sponsored the development of a model administrative revocation law entitled "Model Revocation on Administrative Determination Law" (ROAD). (See appendix D.) (The initial version of this law was released in October 1982.) Recently, NHTSA supported a study of 19 State laws, and based on this study, modified the original ROAD sample legislation.[32]

Provisions of Administrative Revocation Laws.— Administrative revocation laws vary from State to State, but in general they have three major provisions. The first of these is a provision for suspension or revocation upon administrative (rather than judicial) determination. This provision normally also includes a specification that the administrative determination will be based upon a report by a law enforcement officer. It also specifies the basis for administrative revocation, such as refusal to submit to a BAC test or evidence that

* Extracted from Safety Study Report No. NTSB/SS-84/01 (1984)

[28] "Implied consent" laws provide penalties for refusal to submit to a chemical test for intoxication when arrested for a DWI offense.

[29] An exception to this rule is the District of Columbia which since 1954, has been suspending the licenses of persons charged with driving while under the influence and other serious offenses without waiting for a formal conviction notice from the courts.

[30] Reeder, Robert H., "Analytical Study of the Legal and Operational Aspects of the Minnesota Law Entitled Chemical Test for Intoxication." MSA Sec. 169, 123. NHTSA Report No. DOT HS-806-170, December 1981, Final Report. Available from National Technical Information Service, Springfield, Virginia 22161.

[31] Reeder, 1981, Ibid.

[32] English, J.W., Early License Revocation for Driving While Under the Influence: Model Revocation on Administrative Determination (ROAD) Law, Revised Edition, December 1983. Available from NHTSA, 400 Seventh Street, S.W., Washington, D.C., 20590.

the individual was operating a vehicle while having a BAC of 0.10 percent or greater.

Table 5.—States With Administrative License Revocation Laws

Alaska	Missouri
Colorado	Nevada
Delaware	New Mexico
District of Columbia	North Carolina
Indiana	Ohio*
Iowa	North Dakota
Louisiana	Oklahoma
Maine	Oregon
Minnesota	Utah
Mississippi	Washington
	West Virginia

The second major provision in most administrative revocation laws is that the offender must receive a notice of revocation (usually given to him or her by the police officer in exchange for his or her driving permit). The document given to the offender by the police officer also must include information on the method by which the offender can receive an administrative review or hearing on the suspension and the effective date upon which the full suspension will begin and end unless the license is reinstated upon review.

The final major provision of this type of law has to do with the administrative review and hearing procedures designed to ensure that the offender's rights are protected. Included in this section may be provisions for judicial review of the administrative action.

Operational Procedures Under Administrative Revocation Laws.—When a driver is stopped by a police officer who has probable cause to arrest the driver for a drinking/driving offense, the officer will ask the driver to submit to a breath test. The driver is warned that refusal of the test will result in a license suspension and is further warned that if he or she takes the test and is over the specified BAC limit, this will also result in a suspension. If the driver either refuses the test or takes the test with a result which is over the limit, then the police officer will then take the driver's license. The offender is then provided with a notice which serves both as a temporary driving permit (typically for 7 to 30 days) and as a notice that the driver has right to request both an administrative and, ultimately, a judicial review of the suspension. The driver is, of course, not allowed to drive from the scene and is held in custody for a specified period of time or released to a "responsible party."

The administrative review can consist of two actions: a departmental review and/or an administrative hearing. A departmental review is conducted by a driver analyst, without the arresting officer present, and is not a hearing. This process protects the driver by providing an independent review to ensure that the officer had probable cause to stop the person and that the officer complied with the other provisions of the implied consent statute.

In addition to this review, a more formal administrative hearing, in which the police officer and the offender are present and are permitted to provide testimony, will normally be available to the offender. In addition, the offender always has the right to take the issue to the court for a judicial review. Not all States provide for a rapid departmental review or administrative hearing, but each State which has an administrative revocation procedure must provide for an administrative hearing in order to meet the requirements of due process.

The NHTSA model law requires an alcohol assessment of the driver before the license is reinstated. Most State motor vehicle laws allow the motor vehicle department to refuse licenses to individuals who are known to be alcoholics or are known to have drinking problems. The State is under some obligation, therefore, to assess the drinking status of individuals who have had their licenses suspended or revoked as a result of a drinking-driving arrest, particularly in the case of multiple offenders (found to be classifiable as problem drinkers in at least 9 out of 10 cases).[33]

Legal Issues.—There has been considerable controversy over whether the driver's license represents a right or a privilege for the individual. The Supreme Court[34] addressed this issue by taking a position somewhat in between, holding that "Once licenses are issued . . . their continued possession may become essential in the pursuit of the livelihood. Suspension of issued licenses thus involves State action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that procedural

*Subject to judicial review on first offense.

[33] University of South Dakota Program Level Evaluation of ASAP Diagnosis, Referral and Rehabilitation Efforts, Volume II, 1976. Available from the NHTSA, 400 Seventh Street, S.W., Washington, D.C. 20590.

[34] For a review of the relevant cases, see Reese, John H., Summary Suspension of Driver Licenses of Drunken Drivers—Constitutional Dimensions, in Administrative Driver License *Suspension and Revocations Prior to Court Appearances*, National Highway Traffic Safety Administration, August 1982, Washington, D.C. 20590.

due process required by the Fourteenth Amendment."[35] Therefore, the summary suspension procedures provided for in the administrative revocation legislation must meet the requirements of due process. While the Supreme Court thus established a requirement for due process in the suspension of licenses, it has also recognized certain areas in which property may be seized summarily without affording an owner a determination hearing. These have included such things as protection of national security during war time and protecting the public health from unsafe food and drugs.

In considering the extent to which hearings and other due process requirements are applicable to administrative suspension of social security disability benefits, the Supreme Court established tests to determine the balance between public needs vs. private rights.[36] In this case, the court recognized three factors:

1. The private interest that will be affected by the official action.

2. The risk of an erroneous deprivation of such an interest through the administrative procedures used and the probable value, if any, of additional procedural safeguards.

3. The government's interest and need, including the fiscal and administrative burdens of additional safeguarding procedures.

Decisions by the Supreme Court and the U.S. District Courts have established the principle that the offender is protected sufficiently if an opportunity for hearing is provided speedily following the actual suspension.[37] The hearing need not precede the suspension, providing the mechanism which is established does permit the offender to receive reasonably prompt action.

To ensure the maximum protection of the individual, the NHTSA model ROAD law proposes an immediate administrative "review" providing for independent consideration by the motor vehicle department of the written testimony presented by the police officer and of written or oral presentations by the offender. This can be done rapidly by a licensed examiner and gives the offender an early opportunity to overturn an erroneous suspension. In addition, the NHTSA model law proposes that provision be made for a more formal hearing at which the arresting officer, as well as the offender and counsel, could be present and give testimony. Available to the offender, in any case, is an appeal to judicial system for redress.

To date only one State's administrative revocation law has been tested in a State supreme court. In the case *Heddan* v. *Dirkswager* 336 N.W.2d 54 (S.Ct. Minn. 1983), the Minnesota State Supreme Court upheld the Minnesota law against the claim that it violates due process of law.

Effects of Administrative Revocation.—Under the general deterrence concept, administrative revocation laws should contribute to the deterrence of drunk driving if several effects are observed. First and most importantly, administrative revocation laws should make license suspensions routine for nearly all arrested drunk drivers and those who refuse a chemical test. Thus, the likelihood of an immediate and significant penalty for the DWI offense is increased. A secondary effect should be to encourage police to increase DWI arrests by ensuring that the DWI offenders they apprehend are penalized. Currently, many police officers are discouraged by the widespread practice of plea bargaining and dismissals of DWI cases. In addition to deterrence considerations, administrative revocation laws could affect the criminal adjudication of DWI cases by influencing judges to reduce the severity of court sanctions if the offender has already lost his or her driving priviledge.

Since administrative revocation laws have only recently been enacted in most States, only a limited amount of data are available on these questions. However, for those States, such as Minnesota and Iowa, which have used the procedures for several years, some pertinent information is available.

License suspensions/revocations.—Perhaps the best illustration of the effect of an administrative revocation law on revocations is provided by Iowa, where the law became effective on July 1, 1982. (The effect is shown in table 6.) Historically, drinking drivers who refused to take a chemical test had their licenses revoked under the Iowa implied consent law which existed before July 1982. As can be seen from table 6, the number of revocations for refusal to take the test remained essentially constant after the new administrative per se law was passed. In contrast, revocations from court convictions for drinking-driving offenses dropped during the first year after the administrative revocation legislation took effect. More importantly, during this period there were nearly 14,000 ad-

[35] Bell v. Burson, 42 US535, 539, 91 S. CT, 1386, 29.L. Ed. 2nd 90 (1971).

[36] *Mathews* v. *Eldridge*, 424 US 319, 335, 96 S. CT, 893, 47 L. Ed. 2D18 (1976).

[37] See, e.g., *Mackey* v. *Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61L. Ed. 2d 321 (1979) in which the Supreme Court upheld the constitutionality of prehearing license revocation proceedings where the driver refused to take a chemical test for alcohol concentration.

ministrative revocations which resulted from individuals who took the chemical test but provided a result over 0.10 percent. Likewise, suspensions for a test result of over 0.10 percent were greater than the total number of revocations for all reasons in the prior year. Overall, the number of suspensions almost doubled in the first year after the passage of the administrative revocation law.

Similar data are shown for the State of Minnesota in table 7.[38] Since 1977, the first full year after implementation of the administrative revocation law, the total number of revocations has been increasing with the number now approaching twice the total typical before enactment of the administrative revocation law. These data reflect an interesting transition in the administrative revocation law that occurred on July 1, 1982. Until that time, motorists charged with DWI could take advantage of the fact that the loss of license was only 30 days on conviction in court (as compared to 90 days under administrative revocation) by pleading guilty at arraignment before the administrative revocation took effect. Once this loophole was eliminated, almost all revocations have been a result of administrative procedures with the courts assessing only fines and jail sentences.

Table 6

Impact on the Number of Revocations Produced by Passage of the Administrative Revocation Law++ in Iowa

	July 1, 1980 to June 30, 1981	July 1, 1981 to June 30, 1982	IMPLEMENTATION OF LAW	July 1, 1982 to June 30, 1982
Convictions for refusal to take test	2,262	2,313		2,389
Revocations as result of conviction	7,591	9,882		6,155
Revocations under Adminstrative procedures BAC 0.10%	——	——		13,680
TOTALS	9,853	12,195		22,224
DUI arrests in 7 major Metropolitan Counties	6,912	6,850		7,697
Fatal Accidents				
Day 6 am–9 pm	473	425*		390**
Night 9 pm–6 am	329	271***		230****

[38] Unfortunately, records were not kept of the number of revocations for refusals as compared to the number of revocations for conviction of DWI prior to the passage of the administrative revocation law on July 1, 1976. Another factor which complicates the interpretation of these data is that a 1976 decision of the Minnesota Supreme Court held that a driver had a right to counsel prior to submitting to a chemical test for intoxication. This requirement resulted in the dismissal of a number of pending DUI cases with the result that in 1976 the number of revocations dropped.

++ Source: Governor's Office of Highway Safety, State of Iowa.

* 10% reduction from prior year.
** 8% reduction from prior year.
*** 18% reduction from prior year.
**** 15% reduction from prior year.

The more specific question regarding the apparent overall increase in revocations is what proportion of those being arrested actually lose their licenses. If the administrative revocation system is working effectively, the great majority of all individuals arrested should receive an administrative revocation since most arrests occur only when there is a chemical test at or above the State's legal limit. (In most jurisdictions, individuals are only infrequently arrested with BAC's below the State revocation limit.) Barring unusual situations, the licenses of all individuals arrested should be administratively revoked, based on having been operating a vehicle and having either refused a BAC test or provided a test with a result over the revocation limit.

There is evidence that the majority of the licenses of those arrested are being revoked in those States tually more revocations than there are arrests since, under their dual track system, individuals can receive two suspensions, one as a result of the administrative procedure and one as a result of the independent court conviction.[39] In Delaware, a detailed followup of individuals arrested in the first year of the implementation of its administrative revocation law found that 96 percent of the individuals arrested for DWI by the police had licenses revoked as a result.[40] Similarly high suspension rates are reported by the Department of Motor Vehicles for the District of Columbia which has been using a suspension system similar to administrative revocations for some years. which have had the administrative revocation law for a long enough period of time to provide data on the number of revocations relative to the number of arrests. In Minesota and in Iowa, there are ac-

Table 7
Revocation of driver's licenses and arrests for alcohol-related offenses in Minnesota

Year	Court Based Revocations (§169.121)	Chemical test refusal (§169.123)	Administrative Revocations over 0.10% BAC+ (§169.123)	Total Revocations
1974	*	*	*	15,396
1975	*	*	*	17,628
1976	*	*	*	14,251***
1977	*	*	*	17,741
1978	15,512	3,344	5,501	24,357
1979	14,797	3,427	6,742	24,966
1980	17,406	3,863	9,212	30,481
1981	19,009	4,427	8,607	32,043
1982	9,400**	8,456	19,168	36,024****
1983	156	11,583	23,064	34,903
	30 days	6 months	90 days	

* Data not broken down and not available.
** Law change in 1982 which prevented 30-day court-imposed suspension from blocking 90-day administrative suspension.
*** The lower number in 1976 is attributable to the decision of the Minnesota Supreme Court in *Prideaux v. Department of Public Safety*. 247 N.W.2d. 385 (1976), which held that a driver had a right to counsel when submitting to a chemical test for intoxication. It caused the dismissal of a number of pending cases.
**** Includes 3,000-case backlog.
\+ Source: Motor Vehicle Department and Office of Traffic Safety of Minnesota Department of Public Safety.

[39] In Minnesota, in 1982 (table 7) there were 23 percent more revocations than arrests. This is also due to the fact that some arrests are not listed in the official files if the individual is not prosecuted as well as the double suspensions that occur. These drivers do receive revocations, however, if they refused the test or were over the legal limit. Iowa also shows more revocations than arrests.
[40] Information provided by the Governor's Highway Safety Representative, State of Delaware.

Administrative Revocation and Licensing Agencies.—A feature of the administrative revocation process is that it provides for a hearing for the driver who has been reported to have refused a BAC test or to have had a BAC above the revocation limit. One indication of the burden of revocation laws on licensing agencies is the numbers of individuals who take advantage of the hearings. In Delaware during the first year of the implementation of its administrative revocation law, only 23 percent of those suspended requested even a departmental hearing. Minnesota initially had a problem with a large number of appeals to the courts on the motor vehicle department's determination because the initiation of such an appeal resulted in a stay of the revocation. However, when the law was changed so that the revocation took place before hearing of the court appeal, the appeal rate went down. Only 7½ percent of drivers whose licenses had been suspended appealed during 1983.[41]

Administrative Revocation and the Police.—An important aspect of the administrative revocation procedure is its effect on individual police officers and department commanders. If the officers see administrative revocation as providing assurance that offenders will be penalized (by the loss of a license rather than avoiding conviction), this should encourage their DWI effort, resulting in an increased number of arrests. If, on the other hand, the officers see the administrative revocation procedure as being unfair to the driver, it could have the opposite effect.

As shown in table 7, DWI arrests in Minnesota, after dropping in 1977 (probably as a result of the Supreme Court decision which resulted in the dismissal of a large number of DUI cases), have been increasing yearly; in 1982, they are well above the preadministrative revocation period before 1976. In Iowa, arrests rose 12 percent after enactment of administrative revocation laws. (See table 6). These data suggest that administrative revocation laws increase rather than reduce arrest activity. The longer-term experience of the State of Minnesota suggests that the law may have a motivating effect on the police.

Administrative Revocation and the Courts.—The effect of the passage of administrative revocation legislation on the court system is not yet known from the limited experience with the law. However, initial data from Minnesota, which has had the administrative revocation system in place the longest period of time, suggest that it does not have a major effect. The number of revocations resulting from DWI court convictions after the passage of the law remained constant until additional legislation in 1982 made administrative procedures the primary procedure for revoking the license. (See table 7.)

As shown in table 6, there was a reduction in the first year in the number of suspensions due to court convictions in Iowa. It remains to be seen whether this reduction will continue or whether, as suggested by the data from Minnesota, the number of suspensions due to court conviction will continue to increase beyond the number made before the law. In any case, the experience in Minnesota and Iowa suggests that the use of administrative revocation does not have a major impact on the use of suspension by the courts. Insufficient data are available to determine whether this procedure affects other penalties which are assessed by the courts.

Administrative Revocation Laws and Alcohol-Related Accidents—Obviously, the most important measure of the effectiveness of the administrative revocation countermeasure is the effect on reducing the number of alcohol-involved accidents. However, it is extremely difficult to evaluate the effect of administrative revocation laws on highway fatalities because of the various factors which influence accident statistics. The Minnesota data shown in figure 1 illustrate the problem. The graph shows a dramatic contrast in the trend of the highway death rate and the license revocation rate. While the license revocation rate had been increasing slowly before 1976, it climbed rapidly after enactment of the administrative revocation law, doubling in the next 4 years. The fatality rate in Minnesota has also dropped since the passage of the administrative revocation law. However, the reduction began in 1968, accelerating in the 1980–82 period when fatalities were decreasing nationwide. Evidence of a reduction in alcohol-related fatalities is shown in table 6. In Iowa, after passage of the administrative revocation law, nighttime fatal accidents declined 15.1 percent, compared to an 8.2-percent decline in daytime accidents. However, nighttime fatal accidents had declined 18 percent in the year before the enactment of administrative revocation legislation. Therefore, the differential reduction after enactment cannot be attributed conclusively to enactment of the administrative revocation law alone.

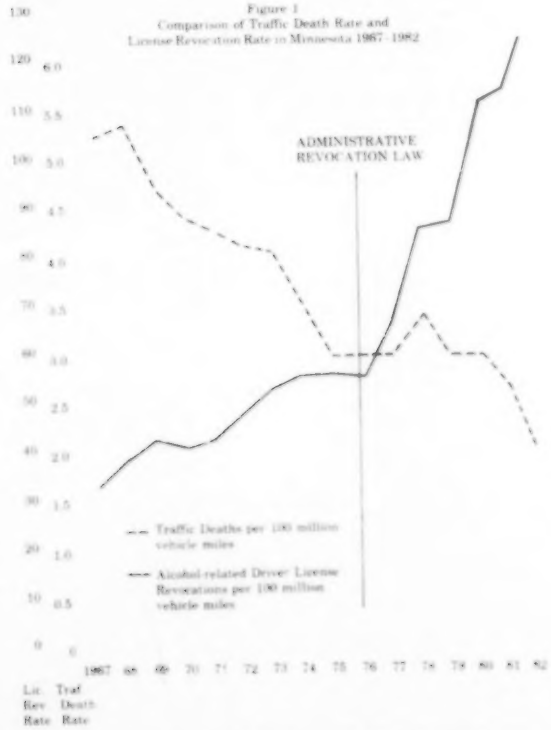
Combined Effect of the Use of Checkpoints and Administrative Revocation

While a number of States are using the sobriety checkpoint enforcement system and also have administrative revocation laws, these elements were not enacted at the same time. Therefore, it is dif-

[41] Information provided by Office of Traffic Safety, State of Minnesota.

ficult to determine what the combined effect of these two countermeasures has been on accidents.

Delaware provides the best opportunity currently available in the United States for evaluation of the combined effects of these programs. Delaware enacted a toughened drinking-driving law in October 1982, which featured sobriety checkpoints and administrative revocation. The first full year of the implementation of both of these new countermeasures was 1983. During 1983, 84 sobriety checkpoints were established by the Delaware State Police resulting in 15, 469 vehicles stopped. Of these, 890 were detained for further investigation and 295 DUI arrests were made.[43] Also during 1983, as a result of the administrative revocation procedure, the licenses of 96 percent of the drivers arrested were revoked. The total number of arrests remained essentially constant, rising only 1.7 percent. However, the number of DUI arrests had already increased 2 years before when additional resources were provided for enforcement.[43]



The change in accident statistics in Delaware following the initiation of the checkpoint and administrative revocation legislation is encouraging. Between 1982 and 1983, there was a 13.8-percent decline in total fatal accidents and a 17.3-percent decline in alcohol-involved fatal accidents. The impact appeared to be even greater among injury accidents where the total decline was only 3.5 percent from 1982 to 1983 but the decline in alcohol-involved accidents was 21.9 percent. These declines occurred despite an 8-percent increase in sales of fuel in Delaware, indicating that the reduction could not be explained by reduced travel.[44] In addition, between 1982 and 1983, there was only a small decline in fatal accidents nationwide.

Perhaps the most impressive indication of the potential impact of these two countermeasures in Delaware is the number of drinking drivers involved in fatal accidents. Delaware is one of the few States which test nearly all fatally injured drivers for alcohol. When the number of drivers who are fatally injured and tested for alcohol is added to the number of surviving drivers in fatal accidents who were charged by the police with drunken driving (and also tested for BAC), the number of drinking drivers (BAC greater than 0.05 percent) in fatal accidents decreased by 19.1 percent from 1982 to 1983.[45] This reduction is based on known BAC levels and is not subject to the biases which sometimes occur in police judgments regarding whether a driver was drinking. While more detailed analysis of accident data over a number of years will be required to confirm that this change can be attributed to the new law, this reduction in the number of accident-involved drinking drivers is impressive.

Conclusions

Based upon its review of the current literature and recent experience in national and international efforts to control drunk driving, the National Transportation Safety Board believes that general deterrence programs afford the most promising approach for the short-term reduction in alcohol-related deaths and injuries on our highways. Further, upon consideration of the information presented in this report, the Safety Board believes that the sobriety checkpoint and administrative license revocation procedures are potentially effective deterrent measures that warrant broader application by the States.

The National Transportation Safety Board, therefore, concludes that sobriety checkpoints and administrative license revocations should be an integral part of a State's comprehensive alcohol and highway safety program.

[43] Data provided by the Governor's Highway Safety Representative, State of Delaware.
[44] Ibid.

[44] Ibid.
[45] Ibid.

☆ U.S. Government Printing Office: 1986—621-420/00133

DOT HS 806 921
April 1986